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No. 744

FILED
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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 13,036

LUTHER CREASY,

Plaintiff-Appellant,

vs.

OHIO POWER COMPANY,

Defendant-Appellee.

Appeal from a Judgment of the United States District Court
for the Southern District of Ohio, Eastern Division.
(Civil Action No. 4,116)

APPENDIX for APPELLANT

ROBERT L. MELLMAN,
Attorney for Appellant,
150 East Broad Street,
Columbus, Ohio.

BERNARD S. GLICK,
Of Counsel,
37 Newark Street,
Hoboken, New Jersey.

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Docket Entries | Luther Creasy vs Ohio Power Co | Civil No. 4116

3-27-54	Complaint and Demand for Jury filed
" " "	Summons - Copy of Complaint to Marshal, NDO.
6-17-54	Summons returned executed 6-8-54 filed.
7-13-54	Entry to Plead filed.
7-10-54	Defendants Answer filed.
7-22-54	Interrogatories on behalf of Plaintiff filed.
8-18-54	Entry - time extended for Answer or Objections to Interrogatories to 8-23-54 filed.
8-23-54	Defendant's Answer to Interrogatories filed.
" " "	Defendant's Objections to Interrogatories and memo filed.
8-31-54	Motion of Plaintiff for Inspection, etc filed & affidavit.
9-10-54	Note: Objection & Motion Submitted - Entry to come
9-30-54	Entry Motion Sustained filed.
10-22-54	Interrogatories of Plaintiff filed.
11-1-54	Objections to Interrogatories filed.
11-4-54	Plaintiff's Notice of Motion to Compel Defendant to Produce & Permit Inspection filed..
11-5-54	Answers to Interrogatories & Certificate of Service filed by Defendant
11-12-54	Note: Objection & Motion Submitted - 10 days Defendant brief on Motion.
11-15-54	Entry on Objection filed.
11-17-54	Plaintiff's Memo in Opposition to Certain Interrogatories filed.
12-28-54	Memo - Defendant's Objections to Interrogatories 2, 3, 4, 6, 7 Overruled. Entry to come.
1-13-55	Defendant's Answer to Interrogatories filed.
1-25-55	Entry on Memo of 12-28-54 filed.
5-6-55	Entry granting leave to withdraw copy contract filed.
6-2-55	Plaintiff's Notice to Take Depositions filed.
7-2-55	Subpoena returned executed 6-8-55 filed.
7-14-55	Deposition of James F. Long filed.
1-10-56	Interrogatories of Plaintiff filed.
1-23-56	Entry Defendant granted leave to Answer or Object to Interrogatories by 2-1-56 filed.
2-3-56	Entry Defendant granted leave to Answer or Object to Interrogatories by 2-8-56 filed.
2-3-56	Plaintiff's Trial Brief filed.
2-8-56	Defendant's Objections to Interrogatories - Memo filed.
2-10-56	Plaintiff granted 10 days for brief on Defendant's Motion.
2-20-56	Memo of Plaintiff filed.
4-20-56	Order - Objections to Interrogatories 1, 2a, 2b, 2e, 3a, 3f, 3g, 3h, 4a, 4d, 5 & 6 -- Overruled. Objections to Interrogatories 2c, 2d, 3b, 3c, 3e, 3i, 4b, and 4e--Sustained filed.
5-23-56	Defendant's Answers to Interrogatories filed.
5-31-56	Pre Trial Order filed.
6-1-56	Plaintiff's Pre-Trial Brief filed.
6-15-56	Plaintiff's Trial Brief filed.
6-18-56	Defendant's Precipe filed.
" " "	Subpoenas Duces Tecum to Marshal, SDO
" " "	Plaintiff's Supplemental Brief filed.
6-20-56	Trial to Court - Jury empanelled and sworn - Opening Statements - Cecil, Judge - Plaintiff's Testimony - Court

	Continued till tomorrow.
6-21-56	Jury Trial continued - Plaintiff's Testimony continued - Court continued until tomorrow.
6-22-56	Jury Trial continued - Plaintiff's Testimony - Defendant's Motion for Directed Verdict — Sustained.
6-22-56	Verdict for Defendant.
" " "	Subpoena returned executed 6-20-56 filed.
" " "	Subpoenas (2) returned executed 6-20-56 filed.
6-29-56	Subpoena returned executed 6-22-56 filed.
" " "	Judgment Entry for Defendant - Defendant to recover costs expended filed.
7-21-56	Subpoena returned executed 5-31-56 filed.
" " "	" " " 6-1-56 "
" " "	" " " 6-9-56 "
" " "	" " " 6-20-56 "
7-27-56	Notice of Appeal filed.
8-16-56	Bond on Appeal filed.
9-4-56	Affidavit for extension of time for filing record on appeal filed.
9-4-56	Entry - Order extending time for filing of record on appeal and docketing appeal time is extended until 10-25-56 filed.
10-24-56	Reporter's Transcript filed.
10-24-56	Record certified to US Court of Appeals at Cincinnati.

COMPLAINT

Plaintiff demands trial by Jury

1. Plaintiff is a citizen of New Jersey and defendant is a corporation incorporated under the laws of the State of Ohio. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

2. On or about June 25, 1952, plaintiff was employed by Hoosier Engineering Company and was engaged in installing wires for the defendant on a pole owned and controlled by the defendant in Hicksville, Ohio.

3. By reason of the negligence of the defendant, plaintiff was caused to sustain an electric shock from a wire charged with a high voltage which wire and the transmittal facilities of electricity passing through same was owned and in the control of the defendant.

4. As a result, plaintiff was rendered unconscious for a long period of time; he sustained burns to his person; he was obliged to have amputated certain members of his body and limbs; his nervous system was severely damaged; he was obliged to undergo medical and surgical treatment for his said injuries; he was caused to endure great pain, suffering and emotional disturbance and he was prevented from attending to his usual duties and affairs. He was obliged to expend divers sums of money for medical expenses and he will in the future be obliged to suffer from all of the foregoing.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Five Hundred Thousand ($500,000.00) Dollars and costs.

Plaintiff demands trial by jury.

/s/ Robert L. Mellman
Attorney for Plaintiff

ANSWER

FIRST DEFENSE

1. Defendant admits paragraph one of the complaint.

2. Defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs two and four of the complaint and therefore denies the same.

3. Defendant denies the allegations contained in paragraph three of the complaint.

SECOND DEFENSE

1. Defendant says that plaintiff's employment had certain risks incident thereto which were obvious and well-known to plaintiff and those risks were assumed by him, and whatever injuries sustained by plaintiff at the time and place and on the occasion mentioned in the complaint were caused by those risks thus assumed by him.

THIRD DEFENSE

1. Defendant says that any injuries sustained or suffered by plaintiff at the time and place and on the occasion mentioned in the complaint were caused in whole or in part, or were contributed to, by the negligence or fault or want of care of the plaintiff and not by any negligence or fault or want of care on the part of defendant.

GINGHER & CHRISTENSEN

By /s/ Paul R. Gingher

Paul R. Gingher
8 East Long Street
Columbus 15, Ohio

Attorneys for Defendant

INTERROGATORIES ON BEHALF OF PLAINTIFF

Interrogatories propounded by plaintiff to the defendant to be answered by the defendant or its duly authorized agent, or any officer thereof competent to testify in its behalf, in writing and under oath, and having the pertinent information to answer the information required in the interrogatories.

1. On and before June 25, 1952 was the defendant engaged as a public utility in the State of Ohio or elsewhere?

2. If the answer to the foregoing is in the affirmative was one of the functions of the defendant as such public utility that of generating electrical power and transmitting electrical energy?

3. If the answer to the foregoing is in the affirmative did the said defendant have a plant or facilities for such purpose located in Hicksville, Ohio?

4. If the answer to the foregoing is in the affirmative, did the defendant own a power house and sub-station poles, electric lines and wires in Hicksville, Ohio, for the purpose of transmitting electricity in and around that locale?

5. If the answer to the foregoing is in the affirmative did the defendant enter into a contract or agreement with the Hoosier Engineering Company, on or before June 25, 1952, pursuant to which the said Hoosier Engineering Company or others was to re-string, replace or install electric lines for the defendant in and around Hicksville, Ohio?

6. If the answer to the foregoing is in the affirmative was the said agreement in writing, and if so, annex a copy of the same?

7. If the said agreement was not in writing, set forth the entire contents of said agreement.

8 How many lines were attached to the second pole from

defendant's substation at Hicksville, Ohio, which were leaving the substation and transmitting electricity along said lines?

9. How many volts of electricity was being transmitted in each of said lines?

10. What are the names and addresses of the witnesses, who, to the knowledge of the defendant, have any knowledge as to the incident of June 25, 1952, wherein the plaintiff was injured?

/s/ Robert L. Mellman
ROBERT L. MELLMAN
Attorney for Plaintiff,
150 E. Broad Street,
Columbus, Ohio.

TO: GINGHER & CHRISTENSEN,
Attorneys for Defendant,
8 E. Long Street,
Columbus, Ohio.

ANSWER TO INTERROGATORIES

1. Yes.
2. Yes
3. Yes.
4. Yes.
5. Yes.
6. Yes - an objection is made to attaching a copy of said agreement.
7. Inapplicable
8. Six.
9. 2300.
10. James F. Long
Ervin R. Rudasill
Brady Gampher
Glen W. Brush

Answer to Interrogatories
Interrogatories on behalf of plaintiff 7a

Carl Evans
Robert D. Harden.

GINGHER & CHRISTENSEN

By_____
Paul R. Gingher
8 East Long Street
Columbus 15, Ohio
Attorneys for Defendant

STATE OF OHIO
LICKING COUNTY, ss:

P. T. Cosway, being first duly sworn, says he is ASST. SECRETARY of the Ohio Power Company, a corporation, and that the above answers to interrogatories are true, as he verily believes.

_____

[Jurat]

INTERROGATORIES ON BEHALF OF PLAINTIFF

Interrogatories propounded by plaintiff to the defendant to be answered by the defendant or its duly authorized agent, or any officer thereof competent to testify in its behalf, in writing and under oath, and having the pertinent information to answer the information required in the interrogatories.

1. Was the Hoosier Engineering Company engaged in work in behalf of the defendant on or about June 25, 1952 at Hicksville, Ohio, pursuant to a contract made between the defendant and Hoosier Engineering Company on November 1, 1948?

2. If the answer to the foregoing is in the affirmative, did the defendant assign an engineer pursuant to the terms of the contract to act in its behalf directing and controlling the manner in which the work was to be done?

3. If the answer to the foregoing is in the affirmative, what is the name and residence of the said engineer?

4. Did he have any subordinates or collaborators employed to assist him therein, and if so what are the names and addresses of such subordinates or collaborators?

5. Pursuant to the said contract, were there detail and working drawings and specifications furnished by the defendant's engineer to the Hoosier Engineering Company covering the work to be done at Hicksville, Ohio?

6. Was the defendant's engineer, or one of his collaborators or subordinates, or any of them, supervising and directing the work being done by Hoosier Engineering Company on June 25, 1952?

7. If the answer to the foregoing is in the affirmative, set forth the names and addresses of such engineer, his collaborators or subordinates who were so functioning on June 25, 1952.

8. Pursuant to interrogatories heretofore propounded requesting the names and addresses of all persons having knowledge of the accident of June 25, 1952 wherein Luther Creasy was injured, the said defendant has furnished the names of Brady Gampher, Convoy, Ohio; Glen W. Brush, Hicksville, Ohio; Carl Evans, Van Wert, Ohio; Robert D. Harden, Kalido, Ohio among others. What is the specific residence of each of the aforementioned?

9. Pursuant to interrogatory No 5 herein, if the same is answered in the affirmative, is the defendant willing to furnish as part of these interrogatories exact copies of the detail and working drawings and specifications?

ROBERT L. MELLMAN
Attorney for Plaintiff
150 E. Broad Street
Columbus, Ohio

TO: GINGHER & CHRISTENSEN,
Attorneys for Defendant
8 E. Long Street
Columbus, Ohio

ANSWERS TO INTERROGATORIES

Answer to Interrogatory Number 1.

Yes.

Answer to Interrogatory Number 5.

Yes.

Answer to Interrogatory Number 8.

Defendant does not have the information requested.

OHIO POWER COMPANY

By_____

STATE OF OHIO

LICKING COUNTY, ss.

P. T. Cosway, being first duly sworn, says he is Assistant Secretary of The Ohio Power Company, the defendant herein, and that the above answers to interrogatories are true as he verily believes.

_____

[Jurat]

ANSWERS TO INTERROGATORIES

Answer to Interrogatory Number 2.

Defendant assigned an engineer pursuant to the terms of the contract. Said engineer did not direct and control the manner in which the work was to be done.

Answer to Interrogatory Number 3.

The engineer assigned pursuant to the contract was:

James F. Long
43 Superior Court
Lima, Ohio

Answer to Interrogatory Number 4

No.

Answer to Interrogatory Number 6.

No

OHIO POWER COMPANY

By_____

STATE OF OHIO
LICKING COUNTY, ss:

P. T. Cosway, being first duly sworn, says he is Assistant Secretary of The Ohio Power Company, the defendant herein, and that the above answers to interrogatories are true, as he verily believes.

_____

[Jurat]

INTERROGATORIES ON BEHALF OF PLAINTIFF

Interrogatories propounded by plaintiff to the defendant to be answered by the defendant or its duly authorized agent, or any officer thereof competent to testify in its behalf, in writing and under oath, and having the pertinent information to answer the information required in the interrogatories.

1. Did defendant examine the pole and anything attached thereto after the accident upon which plaintiff was injured on June 25, 1952?

2. If the answer to 1 is yes state:

a. When, stating the date or dates, was said examination made?

b. Specifically what parts of the pole and the attachments thereto were examined?

c. What was the purpose of said examination?

d. What was disclosed by said examination?

e. Set forth the names and addresses of all persons who made such examination.

3. In its second defense to Plaintiff's Complaint Defendant alleges that Plaintiff's employment had certain risks incident thereto which were obvious and well known to Plaintiff and those risks were assumed by him.

a. Set forth each and every risk which Defendant contends were obvious and well known.

b. In what way would each of said risks be obvious and well known?

c. For how long a period did said risks exist?

d. Did Defendant do anything to correct said risks or reduce

the hazard created thereby?

e. If the answer to (d) hereof is affirmative, specifically what was done and when was it done?

f. Did Defendant ever warn or call attention to such risks?

g. If answer to (f) is affirmative, who in behalf of Defendant did so, and to whose attention was the same directed?

h. When, regarding (f) was the same done?

i. Set forth specifically the manner and the exact language or other means that was used to direct attention thereto.

4. In its third defense to Plaintiff's Complaint Defendant alleges that any injuries suffered by Plaintiff at the time and place mentioned in the Complaint were caused in whole or part, or were contributed to by the negligence or fault or want of care of Plaintiff. State in what manner defendant contends that:

a. Plaintiff was negligent or was at fault or failed to exercise care in his own behalf?

b. What are the names and addresses of persons by whom defendant intends to prove such allegation?

c. What specific act or acts does Defendant charge Plaintiff committed upon which it founds such allegation?

d. What does Defendant contend Plaintiff failed to do upon which it founds such allegation?

e. When did Defendant become aware of the facts upon which it bases such allegation?

5. Does Defendant know or have knowledge or any person or persons who actually saw the accident occur to Plaintiff as alleged in his Complaint?

6. If the answer to 5 is affirmative, what are the names and respective addresses of all such persons?

ROBERT L. MELLMAN
Attorney for Plaintiff
150 E. Broad Street
Columbus, Ohio

TO: GINGHER & CHRISTENSEN
Attorneys for Defendant
8 E. Long Street
Columbus, Ohio

ANSWERS TO INTERROGATORIES

1. No.

3a. The risk of coming into direct contact with energized conductors, while working in close proximity thereto on a pole above the ground.

3f. No.

4a. Plaintiff attempted to work in close proximity to energized conductors on a pole above the ground without using proper safety equipment.

4c. Plaintiff ascended the pole and attempted to work in close proximity to energized conductors without wearing or using the proper protective equipment, and failed to place safety cover over the energized conductors near which he was working.

4d. Plaintiff failed to use the proper safety apparel and equipment while working in close proximity to energized conductors on a pole above the ground.

5. Not at the instant of contact.

OHIO POWER COMPANY

By_____

State of Ohio)
Licking County) ss:

_____, being first duly sworn, says he is _____ of Ohio Power Company and that the above answers to interrogatories are true as he verily believes.

[Jurat]

PRE-TRIAL ORDER

Jurisdiction herein is founded upon the diversity of citizenship plus damage in excess of $3,000.00

1. Plaintiff is a resident of Virginia and the Defendant is an Ohio corporation.

2. On and before June 25, 1952 Plaintiff was employed as a lineman for the Hoosier Engineering Co., an independent contractor, who was under written contract with the Defendant, and engaged in installing new poles and new power lines for the Defendant at Hicksville, Ohio. Some of the lines were energized carrying 2300 volts of electricity. The work had been in progress for several weeks. The plaintiff was an experienced lineman of some years' experience. Pursuant to the terms the written contract between Hoosier and the defendant, which was heretofore furnished to plaintiff's attorneys, is stipulated to be the contract in effect. It is further stipulated that the poles and cross-arms and buck arms were furnished by the defendant and were the defendant's property. On June 25, 1952 plaintiff was injured while on a pole about to engage in his work as a lineman. It is conceded that the poles and cross arms were new and were creosoted and that certain materials were furnished by the defendant; that the official United States Weather Bureau Report for the station at Van Wert,

Ohio records the high temperature for that day at 95°; that for the two days prior to that the temperature was 93°; and that the day succeeeding June 25, 1952, the temperature was recorded at 97°

3. It was stipulated that the plaintiff's wages during the year of the accident, to the date of the accident his earnings were $2,054.70; that he was born on November 16, 1914; and that the formal proof of his life expectancy need not be proven actuarially, but that the tables used in the Ohio practice may be introduced or read into the record for the purpose of showing the life expectancy. All documents heretofore furnished by way of discovery conceded without formal proof except as to their materiality. All hospital records will be admitted without formal proof or the need to produce the custodian of said records. Same may be introduced as either the original or photostatic or actual reproductions of records, subject to objections as to materiality.

4. Defendant is to have the right to a physical examination of the plaintiff at its own cost. No amendments to the pleadings has been requested.

_____

District Judge

JUDGMENT ENTRY

A jury having been duly impaneled and sworn, this cause came on to be heard on the complaint, the answer, the statements of counsel and the evidence offered by plaintiff. The plaintiff having rested his case, the defendant moved the Court for an order entering judgment in favor of the defendant. The Court being fully advised in the premises finds said motion to be well taken and the same hereby is sustained.

IT IS THEREFORE ORDERED that plaintiff's complaint be dismissed and that judgment be and the same hereby is rendered against the plaintiff and in favor of the defendant for its costs herein expended, to all of which plaintiff excepts.

/s/ Lester L. Cecil
J U D G E

Approved as to form:

/s/ Robert L. Mellman
Robert L. Mellman

/s/ Bernard S. Glick
Bernard S. Glick

Attorneys for Plaintiff

GINGHER & CHRISTENSEN

By /s/ Paul R. Gingher
Paul R. Gingher
Attorneys for Defendant

NOTICE OF APPEAL TO UNITED STATES COURT OF APPEALS

Notice is hereby given that Luther Creasy, the plaintiff above named, hereby appeals to the United States Court of Appeals, for the Sixth Circuit, from the final judgment entered in this action on the 29th day of June , 1956.

/s/ Robert L. Mellman
Robert L. Mellman
Attorney for Appellant, Luther Creasy
150 East Broad Street
Columbus, Ohio

Filed: July 27th, 1956

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LUTHER CREASY, Plaintiff, vs. OHIO POWER COMPANY, Defendant.	CASE NO . 4116 (At Columbus)

BEFORE HONORABLE LESTER L. CECIL, JUDGE, AND A JURY, AT COLUMBUS, OHIO, COMMENCING JUNE 20, 1956.

PRESENT:

For the Plaintiff:

R. L. Mellman, Esq., Columbus, Ohio.
Bernard Glick, Esq., Hoboken, N. J.

For the Defendant:

Paul Gingher, Esq.
John C. Elam, Esq.
Markham Miller, Esq.

---

* * *

[Page 7, lines 1 - 4]

MRS. PAULINE L. TOOILL, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GLICK:

* * *

[Page 7, lines 18-20]

Q And are you connected with any medical institution in Columbus? A I am employed by White Cross hospital.

* * *

[Page 7, line 25 - Page 8, line 4]

Q In what capacity are you employed there?

[8] A I am assistant medical record librarian.

Q Do you have charge of the records at the hospital?

A The medical records.

* * *

[Page 8, lines 6 - 24]

Q And do you have here the records with regard to one Luther Creasy? A I have.

Q And are these records made in the usual course of business at the hospital? A They are.

Q And can you tell us from the records the time during which Mr. Creasy was confined in that hospital? A He was admitted on June 27, 1952 and discharged August 21, 1952. He was re-admitted on November 3, 1952 and released November 6, 1952.

Q Now, would the record indicate the manner in which he was brought into the hospital? A Admitted per ambulance.

Q Now, totally, how many days was Mr. Creasy in the

hospital? A Fifty-six on the first admission and four on the second, making a total of sixty days

* * *

[Page 9, line 23 - Page 10, line 5]

MR. GLICK: I should now like to offer the record into evidence, the record of the White Cross hospital with regard to this case.

[10] MR. GINGHER: No objection.

MR. GLICK: Marked as Exhibit 1.

[Thereupon said White Cross hospital record was admitted in evidence as Plaintiff's Exhibit No. 1.]

* * *

[Page 13, lines 22-25]

MRS. MARIAN FOSTER, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GLICK:

* * *

[Page 14, line 12 - Page 16, line 5]

Q And where are you employed? A At the University hospital.

Q In Columbus? A In Columbus, Ohio.

Q In what capacity are you so employed? A Assistant to the medical record librarian at University hospital.

Q In what capacity, do the records of patients and the bills which are rendered come within your jurisdiction? A The medical records of the patient.

Q The medical records of the patient? A That is right.

Q And do you have here the medical records [15] with

regard to Mr. Luther Creasy? A Yes, I do.

Q And can you tell us by referring to the records if you have not already done so, the periods of time when Mr. Creasy was a patient in the University hospital? A Yes, I can.

Q Would you give us the benefit of that information, please? A Luther J. Creasy was admitted to University hospital on April 8, 1953 and discharged on August 3, 1953, a total of 117 hospital days.

Q And can you tell us from the records the nature of the medical or surgical work that was done on him there? A Partial amputation of the left hand and amputation of the right arm below the elbow.

Q And would your records indicate also that there was work done on him involving skin grafting? A The patient was taken to surgery and plastic repair of the scar tissue about the right elbow was carried out.

Q Now, can you tell me, or tell the Court and jury, rather, is this record which you have here one that is made in the usual course of the business of the hospital? A That's right.

[16] Q And may I see the record, please?

A (Witness produces record.)

MR. GLICK: I should now like to offer the record of the University hospital in evidence, sir, as Plaintiff's Exhibit 3.

* * *

[Page 16, lines 13 - 16]

THE COURT: It may be admitted.

[Thereupon said University hospital record was admitted in evidence as Plaintiff's Exhibit No. 3.]

* * *

[Page 19, lines 8 - 11]

MR. ROBERT LEROY MEWHORTER, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GLICK:

* * *

[Page 19, line 21 - Page 34, line 11]

Q * * * Will you please state your full name?

A Robert Leroy Mewhorter.

Q Where do you live, Mr. Mewhorter? A Bowers Trailer Court, Findlay, Ohio.

[20] Q Bowers Auto Court in Findlay, Ohio? A Right.

Q What kind of work do you do, Mr. Mewhorter?

A Line work.

Q Line work? A Yes.

Q Will you explain to us what that means? A Well, that is stringing the wire and hanging transformers, cross arms and stuff like that.

Q In other words, you are an electric lineman? A Right.

Q And were you such on June 25, 1952? A That's correct.

Q Now, will you tell us how long you are engaged in this business? A About ten years now.

Q Now, on June 25, 1952, by whom were you employed?

A Hoosier Engineering Company.

Q And where were you working? A Hicksville, Ohio.

Q And for whom were you doing the work? A Ohio Power Company.

Q Ohio Power Company? [21] A Yes.

Q Can you tell us the nature of the work that was going on there at Hicksville on that day? A Well, we was putting cross-arms on that day on the new poles and stringing new wire.

Q And was there one Luther Creasy employed with you? A That's correct.

Q Was he also working as a lineman? A That's correct.

Q Now, how long had this work been in progress? A What do you mean?

Q The work in general you were doing at Hicksville? A We was there about three weeks, I imagine.

Q On June 25, 1952, did an incident occur on one of the poles? A That's correct.

Q Can you tell us where this pole was? A It was right by the substation.

Q What time of the day was it that this incident occurred? A I can't tell you that.

Q Well, can you approximate the time? A I imagine about two-thirty, along in there.

[22] Q In the afternoon? A In the afternoon.

Q Can you tell us, of your own knowledge, what this incident was that occurred on this pole at that time? A Well, I was working away from the pole at the present time that it happened.

Q How far away from the pole were you working? A Oh, I imagine a hundred feet or so.

Q And was your attention directed to it? A Yes, it was.

Q Well, tell us the manner in which your attention was directed to it and what you observed? A Why, I heard a cracking noise. I looked up and you could see Luther Creasy up on the pole, lying across it, and Sonny Aldrich, he apparently knocked him out of it.

MR. ELAM: We object to what he apparently did.

THE COURT: Yes, that may be stricken. Just state what you saw; do not draw any conclusion.

A (Continued) I seen Luther Creasy on the pole.

Q You said you saw him on the wires. A I saw him on the wires, yes.

Q And can you tell us the manner in which he [23] was on those wires? A Laying across, on his right side.

Q Was there some particular object on the pole that you can identify the area of the pole where he was laying across the wires?

A No, I can't recall that.

Q Well, were there any other things fixed to the pole?

A Wire, yes.

Q Well, what are hung straight on the pole? A Crossarms.

Q That is what I am getting to. Did you, in that observation, note with relationship to the crossarms where he was?

A Yes, I did.

Q Can you tell us? A He was practically in the middle of the crossarms.

Q And when he was on the wires, which side would that be? Would that be to the railroad side or the opposite side?

A That would be to the railroad side.

Q And can you tell us, if you know, what the height of that pole was? A I think it was a 55-foot pole.

[24] Q And was this pole out in the open? A Yes, sir; it was.

Q Or, were there any obstructions in the area?

A It was out in the open.

Q Were there any buildings or trees or anything in close proximity to it? A No, sir.

Q What sort of day was it? A Hot day; very hot day.

Q Was the sun out or was it cloudy? A It was out.

Q Without any obstruction from clouds? A No.

Q Clear day? A Clear day.

Q And do you know what the temperature was that day?

A No, I couldn't tell you that.

Q But, in your opinion, what kind of a day was it with regard to temperature? A Oh, it was very, very hot that day.

Q Now, when you heard this crackling sound and you made this observation, what next, if anything, happened? A Well, Luther Creasy — his brother hollered [25] for us to go up to the pole to help get him out of it.

Q Did you say Luther Creasy? A I said Luther Creasy's brother.

Q Brother? A Yes. He hollered for him.

Q Do you know his name? A They call him Peewee, his nickname.

Q What relationship did he have to you with regard to this job? A None.

Q I don't mean so far as kinship is concerned. A He

was foreman.

Q He was foreman for the Hoosier Engineering Company? A Correct.

Q And you were instructed to do something? A That's right.

Q And what was that? A Go up the pole.

Q And when you observed Luther, that is, the plaintiff, before you ascended the pole -- withdraw that. Did you make an observation to see what had happened to Luther before you ascended the pole? A No, I did not.

Q Well, when did you next see him? [26] A When I got up on the pole, when I seen him.

Q Where was he at that time? A He was out of it at that time.

Q He was what? A He was out of it at that time.

Q Out of what? A Out of the wires.

Q He was no longer on the wires? A He was no longer on the wires.

Q Was there someone else up on the pole? A Sonny Aldrich

Q And where was Luther when you got up the pole, with regard to Mr. Aldrich? A Luther was on the opposite side and Mr. Aldrich was on the other side.

Q Is that where they were when you got up the pole? A Yes.

Q Was Luther standing? A Mr. Aldrich had him, was holding him

Q But they were on opposite sides of the pole? A They

were on opposite sides of the pole.

Q Is that what you are trying to tell us? A Right.

[27] Q Did you observe Luther Creasy's condition when you got up on the pole? A No, I did not.

Q Well, was he conscious, as far as you could see?

A He was unconscious when I got him.

Q Did you make any observations on the arms of the pole?

A Yes. There was slip marks on the cross arms where he was standing.

Q And how many slip marks did you see? A Two there.

MR. ELAM: Now, if your Honor please, we object to the characterization of the "slip marks". He may describe what he saw, but I think that is his conclusion, and we ask that the jury be instructed to disregard it.

THE COURT: That is correct. I will strike the answer and ask the jury to disregard it. He may state what he saw.

Q Well, Mr. Mewhorter, will you tell this Court and jury, in your own way, just what kind of marks you observed up on that arm where Creasy was? A Why, they was marks on the cross-arm like he had slipped on the crossarms.

MR. ELAM: Well now, I move that be stricken.

[28] THE COURT: That may be stricken. Can you describe what you saw without using the word "slip"?

THE WITNESS: What other word?

THE COURT: I don't know. I can't tell you. You -- do you have some other way of describing?

Q Do you know another way of telling us what was there

without using the word "slip"? A It looked like he had fell.

Q What kind of marks were those, Mr. Mewhorter?

A Hook marks, the way it looked, from his hooks.

Q They looked like hook marks? A Right.

Q And how many of them did you see? A Two.

Q And do you know whether the crossarms and poles, that particular pole, were new poles? A Correct. They was new poles.

Q And was that part of the work that your crew had been doing there? A Right.

Q And can you tell us what substance there was on these crossarms? A Creosote.

[29] Q Now, did you make any observation, or did you make any test to determine the condition of the arm that Luther was on?

MR. GINGHER: He can answer that yes or no.

A No, I did not.

Q Well, do you know what the condition of that arm was?

A It was wet with creosote.

Q And, Mr. Mewhorter, you say that you are a lineman with some ten years experience; is that correct? A I am.

Q Now, in climbing a pole, what equipment do you have on your hands in climbing? A Leather gloves.

Q Leather gloves? A Correct.

Q And is that the only thing you have on your hands in climbing? A Correct.

Q Do you wear rubber gloves when you climb? A No.

Q Do you wear rubber sleeves in climbing? A No.

MR. GINGHER: Now, if your Honor please, I should

like to object to that and make the record, for the [30] reason he has not been established as an expert. Those are safety rules promulgated by safety people. He can tell what he does. He cannot give any test, at least he has not qualified himself to this point, in my opinion.

THE COURT: I will sustain the objection.

MR. GLICK: If your Honor please, the man testified he has ten years experience.

MR. GINGHER: He may have done it wrong for ten years.

MR. GLICK: The Company's rule does not make it right, either. They have no right to formulate a rule to suit themselves.

THE COURT: Proceed. I will sustain the objection. You may proceed with the examination.

Q Now, you have worked for many companies as a lineman?

A Just two companies.

Q And do you know of any rule that ever existed with any of those companies which would require you to use rubber gloves in climbing?

MR. GINGHER: Object.

THE COURT: Sustain the objection.

Q Well, was it ever called to your attention that you should use rubber gloves in climbing?

MR. GINGHER: I object to that.

[31] THE COURT: Sustain the objection.

MR. GLICK: Now, if your Honor please, I would like to make clear that this man is an expert. He testifies to ten years experience in this particular field. Now, if there is a

procedure that is used in climbing, I think we are entitled to the benefit of that experience as an expert.

THE COURT: He may testify as to what he did in this connection. I don't believe he can qualify as an expert to testify as to what is correct procedure.

MR. GLICK: If your Honor please, I should like to point out to you--

THE COURT: I don't think it is necessary to argue the point. I have made my ruling and I will adhere to it. Please proceed.

MR. GLICK: Thank you.

Q Did you ever use gloves for the purpose of climbing, rubber gloves? A No.

Q Did you ever use rubber sleeves in climbing? A No.

Q And in climbing a pole, at what point do you put your safety equipment on, in the form of rubber gloves and rubber sleeves? A Before you get on the crossarm underneath the stuff.

[32] Q By the "stuff", you mean what? A Wires, hot wires.

Q Is it also the procedure to do that when you get on the arm? A No.

Q Is it not regular procedure that when you get to the point where your work is to commence, that you then put on your safety equipment? A That's correct.

MR. GINGHER: I object.

THE COURT: Sustain the objection.

Q Can you tell us what arrival point you put on your safety equipment?

MR. GINGHER: Object. He has answered it.

THE COURT: I think he answered it. He may answer it again. You may answer the question.

A There are certain points. If you are in the clear wires, you can get up where the wires are, where they are hot, and put your equipment on.

Q That would bring you up to what point? A At the top crossarms.

Q And under those circumstances, you can put your rubber equipment on at that point? A Correct.

MR. GINGHER: I assume this testimony is being [33] interpreted as to what he does.

THE COURT: Did you make a motion to strike the testimony?

MR. GINGHER: No, I haven't made a motion to strike the testimony, but the answers, as I understood it, he would be permitted to say what he did and not establish a pattern of procedure beyond that, and his answers indicated what has to be done. I am asking it be limited to what he does and his understanding.

THE COURT: The Court accepts his testimony as being testimony of what he does.

MR. GINGHER: Yes.

MR. GLICK: If your Honor please, I want to note an objection to the narrowness of the admission. I think the witness' testimony is entitled to that of an expert.

THE COURT: You may say note an exception.

Q Now, were you back on that pole that same day, following this incident with Luther? A No, sir.

Q How did Luther get down the pole? A I brought him down off the pole.

Q And was he conscious, to your knowledge, when he was being brought down? A Correct.

[34] Q Correct what? Was he conscious? A Unconscious.

Q Do you know of anybody else went up the pole that day after that incident? A I can't recall that.

Q Were you up on that pole the following morning?

A Yes, I was. I was up the following morning.

Q And did somebody go up the pole with you? A No.

* * *

[Page 34, line 17 - Page 39, line 3]

Q The following morning, did you go up the pole to make an examination of it? A I went up the pole the following morning for the safety man for the Hoosier Engineering Company.

Q Did he go up the pole with you? A No.

Q What was the purpose of your going up the pole the next day? A To see where the accident had happened.

[35] Q Were the marks still there? A They were still there; correct.

Q Were there any other marks there? A No.

Q And did you report that to the safety man?

A Correct.

Q Now, in your ten years experience climbing poles, Mr. Mewhorter, did you ever run across slippery crossarms?

A In hot weather.

Q And can you observe that? A Correct.

Q You can see it? A Yes.

Q And did you observe this particular crossarm?
A Correct.
MR. GLICK: I have no further questions.
CROSS-EXAMINATION BY MR. GINGHER:
Q You were working on a pole, or on the ground, at the time this happened? A I was working on the ground.
Q And you were, you say, a hundred feet away?
A Correct.
[36] Q Now, you heard a noise that attracted your attention?
A Correct.
Q And you looked up on the pole? A Correct.
Q You looked to the top of the pole, or toward the top of the pole? A Correct.
Q Now, how many men were there? A I can't recall that now.
Q Was there anyone there in addition to Luther Creasy?
A Correct.
Q You don't know whether it was one man or two?
A I can't recall that.
Q Do you know any man who was there with him?
A Sonny Aldrich.
Q You know Sonny Aldrich? A That's correct.
Q But you don't know whether there was any other man there? A I can't recall that.
Q You say he was laying across the wires? A Correct.
[37] Q Were those the top wires? A The top wires; correct.
Q They were clear to the top of the pole? A Correct.

Q Now, were there other wires below where he was?

A I can't recall that.

MR. GINGHER: Mark these as Defendant's Exhibits A and B, please.

[Thereupon two pictures were marked for identification as Defendant's Exhibits A and B, respectively.]

Q I hand you what has been marked as Defendant's Exhibit A, and will you state to the jury and the Court what that is?

A Crossarms, poles, wire.

Q Do you recognize the picture? A I do.

Q As being a picture where the accident occurred?

A Correct.

Q And on Exhibit A there are two poles. Is it the pole to the left or the pole to the right? A Pole to the left.

Q Pole to the left. Now I am handing you Defendant's Exhibit B. Will you state what that is? [38] A Poles, wires, crossarms.

Q Do you see a picture of the pole on which the accident occurred in that exhibit? A Correct.

Q And which one is it in that picture? A One to the right.

Q One to the right. Now, how many crossarms were there on the pole on which Luther Creasy was hurt? A Four. Right here is where he was standing when it happened (indicating).

Q He was standing —

MR. GLICK: Just a minute. That wouldn't mean anything for the record, and it means nothing back here.

MR. GINGHER: I am certainly going to try to clear it up.

I recognize that.

MR. GLICK: We don't know what exhibit he is referring to.

MR. GINGHER: He is referring to Exhibit A.

Q You say he was standing here. To which crossarm were you referring? A The second crossarm down from the top.

Q The second crossarm down from the top? A Right.

Q Now, will you look below that point where you say he was standing, which is the second crossarm from [39] the top, and still referring to Exhibit A, were there any wires on the crossarm below that? A I can't recall that.

* * *

[Page 39, line 16 - Page 55, line 25]

Q Now, assuming that this picture was taken immediately after the accident occurred, does it indicate wires below the crossarm on which Mr. Creasy was standing, as you say?

MR. GLICK: I object to it on the ground the picture would certainly be self-explanatory.

THE COURT: Overrule the objection.

A There was no wires anywhere he was standing.

Q I am saying below where he was standing?

A Correct.

[40] Q There were energized wires on the crossarm below where he was standing?

MR. GLICK: I object to that. This is something new.

THE COURT: Just a minute. I take it you refer to that question which assumes the picture was taken on the day of the accident?

MR. GINGHER: That is correct. I am still assuming that.

THE COURT: And you are talking about the picture?

MR. GINGHER: And I am talking about the picture.

Q The picture shows wires which are covered, does it not?

A Correct.

Q On a crossarm which is below the crossarm on which Mr. Creasy was standing, as you say? A Correct.

Q Now, I believe you stated that it is your practice to put on your protective equipment underneath the stuff, as you said?

A Correct.

Q Now when you say "the stuff", you mean wires?

A Wires, right.

[41] Q That's right. Now, is it not a fact that you do that whether the wires are covered or not? A Not necessarily.

Q You mean you don't do it if they are covered?

A Not necessarily.

Q You mean sometimes you go through them? A Correct, if they are covered.

Q Without using your equipment? A Correct.

Q Now, is it not a fact, however, that you assume that all wires are hot? A Correct.

Q And so that, before you get into the vicinity of wires which are capable of carrying electricity, you protect yourself and do not depend upon your knowledge as to whether they are hot or not; is that right? A That is correct.

Q Now, under those circumstances, if you were approaching hot wires overhead, and you were on the pole, how would you put

your safety equipment on? A I would put it on before I got to the hot wires and underneath them.

Q You would put it on while you were spiked to the pole?

[42] A Correct.

Q That's right. Now, were the wires on which he was laying when you first saw him, were they covered or not?

A I can't recall that.

Q Did you look at them? A No, I didn't look at them.

Q You have stated that Sonny Aldrich, I believe it was, was on the pole? A Correct.

Q But that Luther was on the opposite side of the pole?

A Correct.

Q And that Sonny was holding him? A Correct. He knocked him out of the wires.

Q You didn't see that, however? A No, I didn't see that.

Q Were they directly opposite each other? A Directly opposite each other; correct.

Q Were they below the wires on which you had seen Luther, when you first looked? A I can't recall that.

Q Now, was Luther protected in any way from falling?

A He had his belt, a safety belt on.

[43] Q All right. I don't think the jury understands that, the safety belt. Will you describe it? A It is a belt that fits clear around you and then you got a strap that fits around the pole.

Q You mean he had the strap around the pole?

A Correct.

Q Now, how far out from the pole can you get with that

strap? A Six feet.

Q Six feet? A Correct.

Q What is the length of the crossarm, normally?

A Eight feet.

Q You say the foreman yelled at you to go up. Where were you when he called you to go up? A I was on the next pole, about a hundred feet away.

Q Where was the foreman? A He was standing underneath the pole, watching the men.

Q And he called for you to go up? A Correct.

Q What did you have on? A I had my hooks and belt on.

[44] Q Did you put safety equipment on? A No.

Q How did you bring him down? A With the hangline across my safety belt.

Q And then you mean you had your safety belt around the pole? A Correct.

Q And you descended with your spikes in the pole?

A Correct.

Q And carried him down? A Correct.

Q Now, he did regain consciousness, did he not?

A When they got him to the hospital; correct.

Q Even before that, didn't he? A I can't recall that.

Q He may have, but you are not certain of it?

A That's for sure.

Q Now, did you observe what he had on? A I can't recall that neither.

Q You mean you did not observe what apparel he had on?

A No, I can't recall that.

Q When you went up there, you did not observe [45] the condition of the wires? A I can't recall that.

Q You mean, you may have at the time, but you don't remember it now? A That's correct.

Q Well, now, you can't remember whether the wires were covered; you can't remember what clothing Luther had on, but you can remember that there were hook marks on the cross arm?

A Correct.

Q And that from the first trip up?

MR. GLICK: Object to that on the ground he says they appeared to be hook marks. Mr. Gingher objected to the use of the word "slip" marks and he, in turn, used the word, that they appeared to be hook marks.

MR. GINGHER: All right.

MR. GLICK: I submit he can't have it both ways.

MR. GINGHER: Well, it was in the record and not stricken that they were hook marks.

MR. GLICK: As an opinion.

MR. GINGHER: I will ask him to describe the marks.

THE WITNESS: They looked like hook marks.

Q Did they dig into the crossarm? [46] A Correct.

Q How is that? A Correct.

Q And you saw two of those? A I saw two of those.

Q How far apart were they? A I imagine six inches apart.

Q But then, as I say, you did see those marks when you went up, but you didn't see these other things? A Correct.

Q When you said the foreman was at the foot of the pole, you mean the foot of the pole where the accident happened, or the foot of the pole where you were? A Foot of the pole where the accident happened.

Q That was immediately after it happened? A Correct.

Q You heard the cracking noise and looked around and it was then that Luther Creasy's brother called you? A Correct.

Q To come and go up the pole and he was then standing at the foot of the pole? A Correct.

MR. GINGHER: That is all.

[47] REDIRECT EXAMINATION BY MR. GLICK:

Q May I see the photographs you were using, Mr. Mewhorter? A (Witness hands to counsel.)

Q Mr. Mewhorter, you indicated on this Defendant's Exhibit A that the pole in question was, which one, to the left or to the right? A To the left.

Q And did you indicate which buckarm it was that Mr. Creasy was standing on? A The second from the top.

Q Is that the one that angles off? A Correct.

Q And are there any wires on the side below that? A No, sir.

Q No wires on that side at all; is that correct? Well, does it indicate here? A Yes, that is correct.

Q There are no wires on that side? A Correct.

Q So that the first wires that existed on that side of the pole would be the ones on top that you are referring to, where he was? [48] A Correct.

Q And the marks on the buckarm would be on the buckarm

angling off toward the railroad? A Beyond the second cross-arm below.

Q You have indicated on this photograph three sets of arms; is that right? A Correct.

Q And you are now referring to the middle set of arms; is that right? A Correct.

MR. GLICK: May I ask the Court's indulgence for a moment? (Confers with co-counsel.)

Q I just wanted to direct your attention to one or two other matters, Mr. Mewhorter. There are some lines running off in an opposite side of an arm which seem to have something thick around them. What is that? A That is called "line hose".

Q That does not appear on the opposite side of the buckarm where Mr. Creasy was? A That's correct.

Q You don't see any lines at all there, no wires of any type? A That's correct.

Q Except on the extreme top arm? A That's correct.

[49] MR. GLICK: I have no further questions of this witness.

RECROSS-EXAMINATION BY MR. GINGHER:

MR. GINGHER: Just one or two questions, if your Honor please.

Q Referring now to Exhibit A, assuming the picture to show the true condition immediately after this happened, there are a number of wires below the crossarm in close proximity to the pole, are there not? A Correct.

MR. GINGHER: That is all.

MR. GLICK: Which particular wires are you referring to in the photograph, Mr. Gingher?

MR. GINGHER: The witness understands. I asked the question.

MR. GLICK: I submit this picture is taken at an angle.

MR. GINGHER: All pictures are.

MR. GLICK: I ask your Honor to view the exhibit and see if in fact that question is not misleading, if it may not ultimately be misleading to the jury? (Hands exhibit to the Court)

THE COURT: I think there is nothing before the Court to pass on.

[50] MR. GLICK: If your Honor please, I think in fairness to the jury who have to ultimately determine the facts in the case, there was just a blanket question asked that there are other lines running below.

THE COURT: At the proper time, you both have an opportunity to interpret your evidence to the jury.

RE-REDIRECT EXAMINATION BY MR. GLICK:

Q Now, the other lines you are referring to in answer to Mr. Gingher's question, do those lines have the safety rubber hose on them? A Correct.

Q Thank you. One further question: As it appears in this photograph on the upper strand of wires, where I notice there are some markings with either numerals or letters, there is no safety equipment on them by way of rubber hosing or matting?

A Correct.

Q But all the other phases are covered? A Correct.

MR. GLICK: Thank you, sir.

RE-RECROSS-EXAMINATION BY MR. GINGHER:

Q Who puts the protective hosing on? A The lineman.

MR. GINGHER: That is all.

[51] BY MR. GLICK:

Q And when does he put it on Mr. Mewhorter?

A Well, you get clearance -- you can go out and put it on coming down or going up.

Q If you are going up there to work and there isn't any on, you have to first get it on, don't you? A That's correct.

MR. GLICK: That is all.

MR. GINGHER: That is all.

THE COURT: You are excused.

And thereupon

MRS. ANNA MILLER, being duly sworn,

testified as follows:

DIRECT EXAMINATION BY MR. GLICK:

Q Mrs. Miller, will you keep your voice up? A Sure.

Q Will you tell us your full name, please? A Anna Miller.

Q What was that again? Mrs. what? A Anna Miller.

Q Mrs. Miller, where do you live? A 244 East Oakland Avenue.

Q Is that in Columbus? A Yes, sir.

[52] Q And how long have you lived there? A It will be three years the 29th day of this month.

Q And do you have rooms that you rent out? A Yes, I do.

Q Now, did Luther Creasy come to live in your home? A Yes, sir.

Q And can you tell us when it was that he first moved into

your house? A Well the first time he came to live at the home was when I lived on Park street He had been released from White Cross hospital. That was in March, 1953. And he stayed there for several months and then they took him to University hospital

Q All right. Now -- A And then he --

Q During the time that he was living in your home on Park street and up until the time he was called back to the hospital, do you know what his physical condition was and what you were able to observe? A It was not very good. He had just been released from the hospital and he was in bad shape.

THE COURT: Just a minute, please. Just describe his condition without drawing your conclusion that [53] it was a bad condition, good condition. Just describe what it was.

A (Continued) Well, he was very weak. He was scarcely able to help himself Through the fact he had lost one arm and the fingers on the other hand, he could hardly help himself.

Q Well Mrs Miller, I have asked you not to be telling us whether he was weak, strong or just medium, but the physical condition that you were able to observe, such as you have indicated the fact that certain members of his body had been missing. At that time, was he intact in so far as his upper extremities were concerned, his arms? Were they visible to you, in normal condition?

A They were visible but, of course, he had part of one arm and he had lost several fingers and thumb of the other arm

Q That is what I am trying to find out. Now, do you know of your own knowledge whether he was able to feed himself?

A Well, of course he didn't eat at my home. He ate at the

restaurant and he said all he was -- he would eat when he went to the restaurant.

MR. GINGHER: We object.

Q Don't tell us anything about what he said. I want to know what you know. [54] A All I know is what he told me, that he couldn't--

MR. GINGHER: Objection.

Q We are not interested in what he told you. We want to know what you personally know, of your own knowledge, not what anyone told you, but you know from your own senses and intellect. Now, can you be of any assistance at all in telling us, from your own observation, whether he was able to feed himself or not, and if you can't, say so.

THE COURT: I believe she has answered that, that she did not see him eat. He didn't eat at her house.

THE WITNESS: No, he didn't eat at my home at that time.

Q At a subsequent time did he eat at your home?

A Yes, when he came back to my home last year. He came back in June of 1955 and then is when he boarded at my home.

Q Now, was his condition the same at that time when he came back last year as it was when he lived at Park street, as far as arms were concerned? A Just about the same.

Q Now then, can you tell us, at that time, from your own knowledge and observations, whether he was [55] able to feed himself? A Well, he could feed himself. If we would cut his meat and spread his bread, then he could feed himself, but he couldn't cut his meat and couldn't spread his bread or anything like

that. You had to cut his meat and if he wanted butter on his bread, we had to spread the butter on his bread.

Q In other words, in some respects he was able to help himself in eating? A Yes, if the food was put on his plate, he could eat. Of course he had difficulty in doing so because he had just the few fingers on the one hand.

Q And if it came to something like steak, something that had to be sliced, — A No.

Q Then he required assistance? A That's right.

Q Now, can you tell us, if you know, if he was able to clothe himself? That is, to don his clothing? A To a certain extent. I would have to button his shirt and if he was going to wear a tie, I would have to tie his tie for him, and he couldn't clothe himself fully. The shoes he wore were boots because he couldn't tie his own shoes. He had to wear boots that he could slip on his feet.

* * *

[Page 60, line 11 - Page 62, line 10]

MR. GLICK: With reference to the contract in existence between Hoosier and Ohio Power Company, do you have the original copy of this contract?

MR. GINGHER: No, we don't have the originally executed copy; no, sir.

MR. GLICK: Do you have a photostatic copy?

MR. GINGHER: We do. (Produces photostatic copy.) Do you want to compare these?

MR. GLICK: Do you have the contract there?

MR. GINGHER: We have the same as you have.

MR. GLICK: I want a contract put into evidence for the

jury's benefit.

MR. GINGHER: We agree, but we only have this one copy. Do you have additional copies?

MR. GLICK: I have the one furnished under [61] Court order, but it is marked up. This is a photostatic copy.

MR. GINGHER: Ours is marked somewhat, also.

MR. GLICK: Well, may you and I step up before the bench and let me make a suggestion which, I think, you might accede to.

MR. GINGHER: Yes, sir.

(Thereupon counsel with the Court at the bench.)

MR. GLICK: If your Honor please, for the record, in accordance with the pre-trial order which was made here, this contract which I am holding in my hands was furnished pursuant to an order of the Court in line with discovery proceedings that were made.

THE COURT: That is a copy of the contract between Hoosier Engineering Company and the defendant?

MR. GLICK: Yes, sir.

MR. GINGHER: That is correct.

THE COURT: I believe the stipulation provided it may be admitted. You may admit the one you have there with the right to substitute an unmarked copy.

MR. GLICK: In view of that, what I was going to suggest was we may have the record clear, that in the preparation of my case, there are certain markings which I placed upon the contract.

[62] THE COURT: What more can you ask? I admitted that.

Now it may be marked as an exhibit and Mr. Gingher will supply an unmarked copy before it goes to the jury. In the meantime you may use that, except it may not go to the jury.

MR. GLICK: I should like to read portions to the jury now

THE COURT: All right You have a right to.

[Thereupon said contract was admitted in evidence as Plaintiff's Exhibit No. 5.]

* * *

[Page 69, lines 7 - 12]

MR. LOUIS E. CREASY, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GLICK:

Q Will you state your full name, please?

A Louis E. Creasy.

* * *

[Page 69, line 17 - Page 111, line 23]

Q * * * Now, Mr. Creasy, where do you live?

A Crooksville, Ohio.

Q Keep your voice up. Are you related to Luther Creasy, the plaintiff in this case? A I am his brother

Q On June 25, 1952, who were you employed by?

A Hoosier Engineering Company.

Q And in what capacity were you employed by them?

[70] A I was line foreman.

Q You were what? A A line foreman

Q And for how long had you been a line foreman for Hoosier? A I would say six years anyway.

Q And prior to your being a line foreman, what was your work? A Distribution and rebuilding, setting poles, new cross-arms.

Q What do you call that? You have told us what type of work you did. What do you call the particular job? Is there some title you have? A Just a rebuild job.

Q Were you a ditch digger? A No.

Q Well, what kind of title was your job known as?

A I was line foreman.

Q Before you became a foreman, what were you?

A I was a lineman.

Q That is what I want to know. How long had you been a lineman? A Oh, about eleven years.

Q That was before you became foreman?

[71] A That's right.

Q And you are familiar with the practices of linemen?

A Yes, sir.

Q You are also familiar with the methods of performing the work that a lineman is obliged to do? A Yes, sir.

Q Now, getting back to Hicksville on June 25, 1952, how long had you been working out there at Hicksville? A About three weeks?

Q And who were you doing the work for? A The Ohio Power.

Q The Ohio Power Company? A Yes.

Q And can you tell us what work was going on there?

MR. GINGHER: If your Honor please, I don't like to interrupt — when he says "who were you doing the work for?",

he says, "Ohio Power Company." I assume that is a general statement and there is no relationship as between him and Ohio Power intended.

MR. GLICK: You are quite right. I did not mean to imply he was an employe of Ohio Power Company.

MR. GINGHER: Very well.

[72] Q I meant the job that was being performed by Hoosier Engineering Company was being done for whom? In other words, you were working for Hoosier Engineering Company?

A That's right.

Q And you were doing some work for whom?

A Ohio Power.

MR. GLICK: Does that clarify the matter, Mr. Gingher?

MR. GINGHER: Very well. Thank you.

Q Now, what kind of work was going on there? A Setting poles, installing new crossarms, stringing in new wire.

Q And while this work was going on, were they wires which were energized and functioning? A At all times.

Q Now, Ohio Power Company at that point had a substation; is that right? A That's right.

Q And how many poles were being set there? A Six or seven, I forget which.

Q Now, was your brother Luther Creasy working there that day? A Yes, sir.

Q And had he been working there for some [73] time?

A He had been there with me all the time.

Q In what capacity was he working there? A He was working there as a lineman.

Q And did your brother have any experience as a lineman?
A Good many years.
Q Was he considered to be an experienced, capable man?
A That's right.
Q Now, in the course of that work that was going on, did Ohio Power Company have an engineer assigned on the job?
A Yes, sir.
Q And do you know who that man was? A James Long.
Q And was there some difficulty encountered on that job because of some materials? A Yes, sir.
Q Who was furnishing the materials for the job?
A Ohio Power.
Q And in the course of your work, did the proper material get sent to the job?
MR. GINGHER: I object. Let him just tell.
[74] THE COURT: Sustain the objection.
Q Was there some difficulty about the material that was sent to the job? A Yes, sir.
Q Will you tell us in your own way just what this difficulty was? A Well, it was dead-end clamps. Ohio Power goes by number. It is a two-bolt clamp. We used that to dead-end with. I told Long that was the wrong clamp, but he insists I use them until he could find out.
Q Let me stop you at that point, Mr. Creasy. You say that you were using the two-bolt clamp to dead-end with; is that correct? A Yes.
Q Now I show you this metal piece, and ask you if you know what that is? A That is a two-0 metal clamp.

Q Is this what is referred to as a two-bolt clamp?

A In our work, it is.

Q Aside from the material in this particular clamp, is this the nature of the clamp that you are referring to? A Yes, that is the nature of it, but it is not the clamp.

[75] MR. GLICK: I should like to offer this clamp in evidence.

MR. GINGHER: I don't believe it is sufficiently identified. The witness himself has said it is not the clamp, and in the nature of it, but he seemed to hesitate as to whether it was completely similar.

THE COURT: Unless that is the same kind of clamp that you have reference to on the job, I don't think it is proper to admit it.

MR. GLICK: Well, the purpose of the offer, sir, is to familiarize the jury with the basic concept of the clamp. We know it is not the clamp. Whatever were used are up there. I merely want to use this for the purpose of the jury's understanding.

THE COURT: Isn't it possible to get the same kind?

MR. GLICK: I will prove, through the witness, it is the same kind. It is a question of what material was in it.

THE COURT: Let him prove to the Court it is a similar clamp.

Q Is this the type of clamp that was used? A Yes, sir.

Q This is the type of clamp that is used; is that correct.

[76] A Yes, sir.

Q Are these clamps made of different types of material?

A Yes, sir.

Q And what materials are they made of? A Some galvanized, some copper, some aluminum.

Q All right. But you definitely know that this is the type of clamp that was used? A Yes, sir.

MR. GLICK: I now make the offer.

THE COURT: What do you mean by "type of clamp"? In what way is it different, or does it compare with the clamp, the two-bolt clamp, you were using there that day?

THE WITNESS: The first ones were galvanized. They are used on guy work, and the copper ones —

THE COURT: Well, the two-bolt clamp you said you used that day, what kind was it?

THE WITNESS: It was a galvanized.

THE COURT: What is this one?

THE WITNESS: That is aluminum. It could be used in copper or aluminum, that type of clamp.

THE COURT: I will admit it. I don't think it is too important.

[77] MR. GLICK: Mark it Exhibit 6.

MR. GINGHER: If your Honor please, it is also a question of materiality of the exhibit, in any event. I don't know whether the record shows my objection.

[Thereupon said clamp was admitted in evidence as Plaintiff's Exhibit No. 6.]

Q Now, you say there are three different types of bolts with regard to material? A That's right.

Q And the difficulty with the clamps that you encountered at Hicksville that day was caused by what, Mr. Creasy? A I

don't get you.

Q What was the trouble with the clamps that were sent down to the job? A That was the wrong kind, galvanized.

Q And what do you use those galvanized clamps for?

A Guy wire.

Q A guy wire? A Yes, sir.

Q What type of clamps was it that was required on this job?

A Copper clamps.

Q And why would copper clamps be required [78] on this job? A Well, it is copper wire.

Q And what was done as a result of the wrong type of clamps being sent down to the job? A Jimmy got us some more.

Q You say "Jimmy". Who was that? A Long.

Q What was done with the clamps that you had on the job there? A He turned them back in.

Q Were some of these clamps affixed to the lines?

A Yes, I had on most all of them.

Q And what happened after those clamps had been affixed to the lines? A We had to remove them and install the right ones.

Q And to your personal knowledge, did your brother and Mr. Long have some dispute about those clamps? A Yes, sir.

Q And did your brother make any complaint to you?

MR. GINGHER: I object. I should think if there is going to be a dispute, what was said and done would be proper, if your Honor please, not just a conclusion.

[79] THE COURT: Sustain the objection.

MR GLICK: If your Honor please, we have to first find

out whether he made a complaint, then we will get to the words.

MR. GINGHER: I am going back to the dispute between his brother and Long You just passed that up and I should have the detail of such a dispute so we could meet it, if the time comes that we should.

THE COURT: I think the only thing that would be competent would be the conversation between the brother and Mr. Long, the dispute that they had.

MR. GLICK: I am developing—

THE COURT: If this witness did not hear it, or doesn't know anything about it except by hearsay, it would not be competent.

Q Did you hear the dispute with your brother and Mr. Long?

A Yes, sir.

Q Will you tell the Court and jury just what was said by each of them, as best you can recall? A Well, Long asked my brother how much spacing he had between the clamps. He told him four or five inches. I forget which now. Long said he wanted six. So he sent my brother to do it.

MR. GINGHER: I object to the last part, "so [80] he sent my brother up to do it."

THE COURT: Yes, that may be stricken. What did he say?

A (Continued) He said he wanted him to go up and change them clamps, make them six-inch spacing.

Q Now, that was on June 25th? A Well, I won't say what day.

Q And had there been some dispute between Mr. Long and

your brother before that? A Yes.

MR. GINGHER: I object.

THE COURT: If he heard it.

MR. GINGHER: I think it is wrong to characterize it as a dispute. I don't know yet that it is a dispute. In the first instance, there was a difference. If there was some conversation, let us have it in that form.

MR. GLICK: The question only elicits a yes or no answer, Judge.

THE COURT: Well, I think Mr. Gingher is correct in saying he ought not characterize it as a dispute or anything else. Find out if they had a conversation, what it was, and then the jury can determine whether or not it was a dispute.

Q Now, to your knowledge, were there some words between Mr. Long and your brother prior to June 25th [81] relative to the clamps that were originally sent down on the job? A Yes, sir.

Q Did you hear the conversation between them?

A Yes, sir.

Q And will you tell us what was said and by whom?

A Well, Long told him he wanted those clamps put six inches apart. My brother said he had changed them so many times he was going to quit. I told my brother not to quit. I would bill him to do the job.

Q That was sometime before the 25th? A Yes.

Q To your knowledge, how many times were those clamps changed? A To the best of my recollection, I know I changed them four times.

Q On June 25, 1952, what pole was Luther working on in the

morning? A He was across the track, I think it was number 3 pole, or number 4, I forget which.

Q And what time did you go out to lunch that day?

A Twelve o'clock.

Q And what time did you resume work after [82] lunch?

A Twelve-thirty

Q Where was Luther working after lunch? A On this side of the track, number 2 pole, when I seen him.

Q Now, do you know why he was working on the number 2 pole in the afternoon? A Yes, sir.

Q Will you tell us why? A Jimmy wanted him to change them clamps.

Q On the number 2 pole? A Yes.

Q Were you present at the time when the request was made for that? A Yes, sir.

Q Now you tell us what was said by whom. A Well, Jimmy tells my brother he wanted the clamps changed and on the outside wires.

Q Where was your brother at the time? A On the ground.

Q Where? A Right at the pole.

Q And what did Mr. Long say to him? A He told him to change the clamps; give them the right spacing.

[83] Q How much spacing did he want? A Six inches.

Q Now, do you recall what time of day this was?

A It was right after dinner.

Q Now, did Mr. Long come over and talk to you after he had spoken to Luther? A Yes, sir.

Q And what, if anything, did he say? A He said -- just told me he just sent him up to change the clamps.

Q Now, after that did you observe what your brother was doing? A No, sir.

Q Did you see him on the number 2 pole? A I seen him climbing it.

Q And after you saw him climbing the pole -- I withdraw that for the moment. Was anyone else on the pole at the time? A Sonny Aldrich was on the pole. He had got up.

Q Who was Sonny Aldrich? A He is Edgar Aldrich. He is an apprentice lineman.

Q You say that Mr. Aldrich was an apprentice [84] lineman? A Yes, sir.

Q And is there some regulation in effect with regard to apprentice lineman working near energized wire? A Yes, sir.

Q And what is that regulation? A He shouldn't have been there. He shouldn't be close to a hot wire.

Q He was already up on that pole? A Yes, sir.

Q Now, after you saw your brother climbing this pole, was there anything else that occurred that attracted your attention? A Yes, sir.

Q Well, will you tell us, in your own way, what that was? A Well, I went to the truck and I just got to the truck and I heard a cracking sound. I looked back and saw my brother across the two outside wires.

Q Let me take that with you slow. You say --

THE COURT: Just a minute, please. Don't repeat the witness' answers and summarize his testimony. Let the

witness testify, please.

MR. GLICK: Could I have his last answer, please?

[85] (Thereupon the last answer was read by the reporter.)

Q Where were these wires, Mr. Creasy? A They was on the top arm.

Q Of what pole? A Number 2 pole.

Q And how high a pole was this number 2 pole?

A To the best of my recollection, it is 55.

Q 55 what? A Black Jack pole.

Q 55 what? A Foot pole.

Q Now, were the wires on that pole covered with safety covering? A All except them two outside ones.

Q And with regard to the various arms on the pole, where was that, on the lower part, the middle part or the upper part?

A All the way to the top.

Q That was up on the top part. But all the other wire in proximity to the pole was covered? A Yes, sir.

Q With that standard safety equipment? A Yes, sir.

Q Now, when you heard this crackling sound, what did that indicate to you? [86] A I knowed somethin, was in it.

Q In what? A Into the wires.

Q And then what did you do? A I hollered at Sonny and told him to get up and pull him off of them and he did.

Q You actually saw your brother on the wires?

A Yes, sir.

Q In addition to instructing Sonny -- when you say "Sonny", you mean Mr. Aldrich; is that correct? A That's correct.

Q -- what to do, did you do anything else? A Just

walked towards the pole and hollered for Banjo Martin, Bob Mewhorter, to come to the pole and get him down.

Q Where was Banjo Martin and Bob Mewhorter? A They was down the alley there a piece from him, and I forget the pole number on that, but in just a few seconds, they were there.

Q And Banjo Martin and Bob Mewhorter, who were they working for? A They was working for me, for the Hoosier Engineering Company.

Q What type of work were they doing? A They are linemen.

[87] Q Now, what did Bob and Martin do? A They went up the pole and brought my brother down.

Q Now, I would like to take you back to a point, Mr. Creasy, to when this job started. Did you have a conversation with Mr. Long with reference to clearance? A Yes, sir.

Q And when did you have this conversation with Mr. Long? A That was before I even started setting the poles.

Q Now, will you tell us what it was that you said to him, or what it was that he said to you in connection with this conversation that you are referring to? A Well, I asked him how about getting clearance on the lines. He said, "We can't".

Q Did he tell you why? A No, sir.

Q Now, so that we can understand what you and Mr. Long were talking about, what is meant by "clearance"? A Well, in other words, you open the oil circuit breaker and set it on manual.

MR. GLICK: I would like to ask the jury if they were able to hear that answer.

[88] Q And what follows from that point? A So I go ahead

and set the poles.

MR. GLICK: What was the answer to the question prior to that about the circuit breaker?

(Thereupon the answer before the last was read by the reporter.)

Q Now, did you say an oil circuit breaker? A Oil.

Q Oil, is that what you mean? A That's right.

Q I was having a little difficulty myself in understanding that. And what is an oil circuit breaker, Mr. Creasy?

A Well, we have them hanging on poles. In other words, they are what they call a — we have some that a limb gets across it, they keep kicking in.

Q Mr. Creasy, I am going to ask the Court to strike your answer. I would like to know what an oil circuit breaker is, not what its function is. A It is a small transformer.

Q What is its function? What is it used for? A Well, that I can't answer. They have so many ways of using it.

Q Well, why is the circuit breaker on the line?

[89] A Well, that is to give you, when you are working on the lines, you get clearance. You set it on manual. If a man gets into it, he stands a chance.

Q You set it on manual. Now, you don't have twelve linemen here, Mr. Creasy. They have to understand what you are talking about. Can you give us some description of these -- what do you call them? A Three shots or oil circuit.

Q Circuits. Yes, sir. Can you tell us what these are? Describe them. A A small can sets on the arm of a pole. It goes from one side of the arm to the other with leads on it.

Q Let me ask this: Is this something that functions like a fuse? A Yes.

Q How many of them are there? A That I wouldn't say, in a transformer.

Q What is the minimum? A Three.

Q Now you say when you asked for clearance, you wanted it set on manual; is that right? A I did.

Q Now, who would set that on manual? A You have to climb up a pole and push a [90] little handle over.

Q Now, do they have this type of — they have this in the substation as well? A Yes, they have a bigger one in the substation.

Q That would be where the main switch would be?

A That's right.

Q Does that work automatically? A Yes, sir.

Q May it also, or can it also be used manually?

A Yes, sir.

Q Now, when you ask for clearance, what is done with those switches? A They are set on manual and then I am notified.

Q Now assuming that a three-switch breaker which breaks automatically, you said it was an oil type, and the oil type, is that automatic or manual? A Well, you use it as both.

Q But it does work automatically? A Yes, sir.

Q Now, how would you set this to function manually?

[91] A You just trip a little handle on it.

Q Sir? A You just trip a little handle on it.

Q In other words, you pull it out? A Well, I don't know how they do that.

Q You break the contact?

MR. GINGHER: Just a minute. I am going to object.

THE COURT: Let the witness testify.

A That I would hate to say, how they do that, because I don't do that.

Q Have you seen it done? A Just only out on poles.

Q How do you do it out on the poles? A We got three shots out on the pole, you take two of them out.

Q You take two out? A You take two out.

Q And what do you do with the two that you take out?

A Well, if I do it, I take them with me and put a red tag on.

Q And when you red-tag them, what is the purpose of red-tagging them? A Nobody is supposed to touch it until I [92] clear it up.

Q Is this just a plain red tag? A Yes, sir.

Q Anything written on it? A "Danger" on it.

Q Now, tell us why it is that you pull two of those out and leave one in? A Well, the reason for taking two out, if a man gets into it, knocks it out, nothing more can come back in.

Q Man gets into what? A The wire.

Q Now, if a man got into the wire with two of those switches pulled out, and functioning manually and there was only one working, you say that it would knock it out? A Right.

Q What would knock that out? A Knock the fuse out, that is left in that one.

Q In other words, by a man falling into the wire, that contact would knock out the fuse, the one remaining one?

MR. GINGHER: Now, I object again.

THE COURT: That is what the witness said and [93] you are summarizing his testimony again.

MR. GLICK: I am trying to avoid that, Judge. I would like to get the picture clarified.

Q Now, when that one remaining switch is knocked out, what happens then when it is working manually? A It is off.

Q What is off? A The juice.

Q By "juice", you mean what A Electricity.

Q Now, that is the way clearance is effected? A Yes, sir.

Q Now, when you don't have clearance effected and all three of those switches remain in, what is the situation with regard to the functioning of the line? A Well, it is pretty dangerous.

Q Why is it dangerous to be working on a line with the three switches in without the clearance? A Well, a man gets into it, he don't stand a chance with his life.

MR. GINGHER: That is not responsive. I object and move it be stricken.

THE COURT: That is not responsive. It may be stricken.

MR. GLICK: Would you ask the question of the witness [94] again, please?

(Thereupon the last question was read by the reporter.)

MR. GLICK: Can you answer that, Mr. Creasy?

A More dangerous.

THE COURT: What happens to the current?

THE WITNESS: Just keep feeding right on through.

Q In other words, if a man fell into the lines and there was

no clearance and the three switches were on, what would happen to the switches when he fell into the lines? A Well, they might knock out before it is too late, or they might stay there. I have knowed them to not never kick out.

Q They don't kick out? A No, sir.

MR. GINGHER: That is not what he said.

MR. GLICK: That is part of what he said.

MR. GINGHER: No.

MR. GLICK: Let us have his answer read.

MR. GINGHER: No. He said he had known them.

MR. GLICK: Read the answer.

THE COURT: Read his answer.

(Thereupon the last answer was read by the reporter.)

Q Well, Mr. Creasy, don't tell us what might [95] and what might not happen because you are speculating. Tell us what you know and not what you think might happen. In other words, you are not supposed to guess about this thing. When a man falls into energized wires that are controlled with these three switches, where there is no clearance on them, what happens with these switches? A Well, the man gets killed, if you don't know how to get him back off.

Q Why would that necessarily be so? A Sure can't get out of there by yourself.

Q What happens with the electricity? A That I don't know. It holds him there, I know that.

Q Does the electricity continue to function? A Yes.

Q And is that why you want these manually operated for clearance? A Yes, sir.

Q So that when the three switches are in and they are not working manually, when a man gets into the wires, the electricity continues to flow; is that what you are telling us?

MR. GINGHER: I object. He has been through that many times.

A You have them, all three --

[96] MR. GLICK: Just a minute.

THE COURT: I think he answered that.

Q And that is why you require clearance when you are working on a line; is that the idea? A Yes, sir.

Q Now, when you pull the two switches, the third switch, does that operate manually or automatically? A It works automatically.

Q That is the one that is in? A The one that is in.

Q And you tell us that Mr. Long would not give you the clearance?

MR. GINGHER: I object.

THE COURT: Sustain the objection.

A Yes, sir.

MR. GLICK: (After conferring with co-counsel:) We had a telephone call from one of the doctors, your Honor, and he wanted to know what time to arrive, and I left instructions for him to be down this morning, if he could.

Q Now, Mr. Creasy, have you done work for other utility companies in the State of Ohio? A Yes, sir

Q And have you done that for any length of time?

A Well, I have been doing that ever since [97] 1940 in this state.

Q Now, in all that time, when you made a request for

clearance, has it ever been denied to you by the other utility companies?

MR. GINGHER: Object.

THE COURT: I will sustain the objection.

MR. GLICK: If your Honor please, what I would like to point out is, that we are trying to establish what is the custom with the utilities company in regard to this particular practice.

THE COURT: No, I don't think that is proper, Mr. Glick. Proceed, please.

Q Is it your practice when commencing a job, to request clearance? A Yes, sir.

MR. GINGHER: Object.

THE COURT: Sustain the objection.

Q Mr. Creasy, do you know any reason why clearance was refused?

MR. GINGHER: Object.

THE COURT: Sustained.

Q Did Mr. Long tell you why he would not accede to your request for clearance?

MR. GINGHER: Object, because he has already testified that he gave no reason.

[98] MR. GLICK: Now, I submit Mr. Gingher has a right to object, but not to be putting words in anyone's mouth.

MR. GINGHER: I am quoting the record.

THE COURT: He has testified what his conversation was and I believe he has already stated he gave no reason.

Q Now, at any time while this work was in progress, did you have any complaints from Mr. Long as to the amount of time

that was ensued in doing this job?

MR. GINGHER: I object.

THE COURT: Sustain the objection. I don't think that is material.

Q Was there a time factor involved in this job, Mr. Creasy? A No, sir.

Q As far as you know, there was not? A No, sir.

Q Now, are you familiar with the practices of linemen climbing poles? A Yes, sir.

Q And you have done that yourself? A Yes, sir.

Q And how many companies have you worked for as a lineman? [99] A That would be kind of hard to say.

Q Well, was it -- A So many of them.

Q (Continued) -- one, two, four? Can you give us some estimate? A Oh, twelve or fourteen, anyhow.

Q And you are familiar with the practices that linemen use with regard to the safety in their work? A Yes, sir.

Q Now, Mr. Creasy, in climbing a pole, what would a lineman wear on his hands, if anything? A Leather gloves.

MR. GINGHER: I am sorry, I didn't understand.

(Thereupon the last answer was read by the reporter.)

Q Would a lineman, in climbing, use rubber gloves? A No, sir.

Q Is there a point at which you put on rubber gloves?

MR. GINGHER: Now, I object.

Q (Continued) In climbing a pole? A Yes, sir.

MR. GINGHER: I object. I don't believe he is qualified to testify to that, "is there a point" I don't believe what he

has done, or even what he has observed [100] done, is necessarily a criterion. There are safety rules and there are instructions under which he was working at the time. Now, I think that is the criterion in this case. Not what may have been done at some other time.

MR. GLICK: I submit Mr. Gingher's statement is highly prejudicial and I submit that the contention is highly erroneous. He makes reference to some nebulous safety rules which are nowhere in this record and it puts a light on this case that does not belong there at this point. I think what he is complaining about is a matter which can be established on cross-examination or defense.

THE COURT: I will sustain the objection for the reason that I don't believe the question asked this witness as to what linemen do, is a criterion or establishes the standard of cure that should be used.

Q Is there a standard which is used by linemen in climbing poles, Mr. Creasy? A Yes, sir.

Q Now, you go ahead and tell us what that standard is.

MR. GINGHER: Same objection, your Honor.

Q Let me ask this: -- I withdraw that question. Are you familiar with that standard? A Yes, sir.

Q Now, can you tell us what that standard [101] is?

MR. GINGHER: Same objection.

THE COURT: I will sustain the objection until he tells the source of the standard Just what linemen do, as I said before, I don't think that is the measure.

Q How do you know what this standard is, Mr. Creasy?

A Well, I did it for years.

Q And it is based on your own experience? A My own experience.

Q Were you also given instructions on it? A Yes, sir.

Q Now, can you tell us what that standard is?

MR. GINGHER: I still object, your Honor.

THE COURT: Is this based on your knowledge of what linemen do, or is this on some standard that has been set up by some authority or company standard, or what is it?

THE WITNESS: It is a company standard.

THE COURT: Company standard?

THE WITNESS: Yes, sir.

THE COURT: Prescribed by rule, is it?

THE WITNESS: Yes, sir.

THE COURT: Have you seen and read the rules?

THE WITNESS: Yes, sir.

[102] THE COURT: All right.

MR. GINGHER: If your Honor please, would not the rules then be the best evidence?

THE COURT: Yes.

MR. GINGHER: Rather than his interpretation of those rules?

THE COURT: Yes.

MR. GLICK: Now, if your Honor please, we are not limited solely to one facet of the rule.

Q Mr. Creasy, do various companies have different rules?

A A lot of them have different rules.

Q And a journeyman lineman, does he use a particular

standard of any one company, or is there a standard that journeymen linemen would use? A They use their own.

Q And are you familiar with the journeymen linemen's standards? A Yes, sir.

Q Was your brother Luther a journeyman? A Yes, sir.

Q Now, can you tell us what that standard is in climbing a pole?

MR. GINGHER: Now, if your Honor please, I still object, and if counsel does not want me to amplify my [103] reason in the presence of the jury, I am willing to step to the bench.

THE COURT: Well, I sustain the objection. If the company, the Hoosier Engineering Company, had standards fixed by rules, then those rules would be the best evidence. If there is any journeyman standard, that is, any union or anything of that sort standard -- is that what you refer to?

THE WITNESS: No, it is a company standard that the companies mostly use.

THE COURT: Well, what did the Hoosier Engineering Company use, that is, the company you were working for and the standard you would be bound by?

MR. GLICK: If your Honor please, may I note an objection to that question on the ground that Hoosier could not set a standard as a matter of law. They might set a standard to suit themselves, but they have no right to establish the law as to what is the correct standard. That would be a matter of interpretation and that is precisely what I am objecting to, and

why I think this whole line of objection based on the company formulating the rule is absolutely wrong. The question is a criterion of law, or a matter of custom If we can establish a particular custom that prevails in an industry which he is familiar with, we have a right to establish that. We are not bound by what Hoosier, or X Y Z says is standard, unless
[104] they are an authority such as the Bureau of Standards.

MR. GINGHER: Well, if your Honor please, I assume it is recognized these people are working for Hoosier, and they set up certain safety standards. The question is whether or not we are going to complain about injury, whether or not in the course of their employment they met the standard they were required to follow.

Now, there are other standards by which they were bound in addition to that, but they are in writing, and if the Court wishes, I will advance to the bench and explain further.

THE COURT: All right.

(Thereupon counsel confers with the Court.)

MR. GLICK: Now, in view of what I have called to the Court's attention, not by way of being arbitrary or attempting to argue the Court's ruling, I would like the record to show that we have brought to the Court's attention the syllabus in the Boxniac case as a matter of substantive law prevailing in the State of Ohio, and what I want the record to clearly indicate is that I am trying, through this witness, to show what standard or standards existed with regard to the practices of linemen who are ascending the pole, and in order that the record may be clear in that respect, I want to point out that the objection that

was introduced to that line of interrogation is predicated upon
[105] the fact that the company, or the union, laid down the rules, and I submit that in line with the law of Ohio and the general law with regard to the qualification of experts, that we are not bound as a rigid measure of standard in what is proper or improper in so far as the functioning of the linemen is concerned by a rule that is made by a company, or a rule that is made by a union, as being the exclusive method and the proper way of doing work.

What I have been endeavoring to show through this witness is the fact that there are variable standards, all of which aim at the same end; that is, the safety of the linemen, and that we are not necessarily bound to show for the qualification of this witness merely what the company rule is, what he thinks it is, or what the union rule, but that he, from the background that he has gained, and the years of experience as a journeyman lineman, and as a foreman thereof, may show what the standard is as a matter of practice, custom and usage, that has existed over a sufficient period of time.

I ask, your Honor, now, in view of what I have stated for the record, that we be permitted to pursue the interrogation of this witness along the lines I have suggested by my line of questions.

THE COURT: The Court will adhere to its original ruling and I will say to the jury this is one of [106] those questions of law. The statement that Mr. Glick has made in the record, is for the purpose of the record and not for the purpose of arguing to the jury, and will not consider it as argument or

evidence, but you will put it out of your mind entirely.

MR. GLICK: Now, sir, in order to proceed, so that I can have clarified the view that the Court has in mind, is it the ruling of the Court now that this witness may only be qualified with regard to his knowledge of the standard as set down by the company rule or by the union rule?

THE COURT: Yes, as to any standards of measurement of conduct, that is correct.

MR. GLICK: And that any other standard that we would attempt to prove, that does not come within the encompassment of standard set down by the company and union, is not considered proper at this stage?

THE COURT: That is pretty inclusive. I don't know what you might offer otherwise, but it is limited, the ruling of the Court, to the question before it, which was the matter of having this witness establish a standard of custom.

MR. GLICK: So that we may properly understand one another, what I will point out, sir, is this, that I am endeavoring to establish a custom and usage and practice [107] over a period of time as a proper standard for journeyman linemen.

THE COURT: I believe you already stated that in the record.

MR. GLICK: I wanted to know whether you were going to preclude a line of interrogation along those lines so we can have this matter squarely in the record.

THE COURT: Yes, I think that is the effect of my ruling.

MR. GLICK: Thank you, sir.

Q Mr. Creasy, do you know at what point it is that a

lineman is supposed to put his safety equipment on by way of rubber gloves? A Yes, sir.

MR. GINGHER: I object to that. I think we had the same question before.

THE COURT: Yes. I will sustain the objection.

Q Are you obliged to know, in your position as foreman, the point at which a journeyman lineman is supposed to put on his safety equipment? A Yes, sir.

MR. GINGHER: Objection. Well, he has answered "yes".

THE COURT: Based on what question? On the accepted rules of the company, or what? What is it based [108] on?

MR. GLICK: I merely wanted to limit that at the point and then go into the question of his knowledge. If he doesn't know, of course, we can't go any further. If he does know, then we go into a question of his knowledge. We have to have a preliminary foundation.

THE COURT: Well, all right. Ask him the next question.

MR. GLICK: Let me have the last question and answer.

(Thereupon the last question and answer were read by the reporter.)

Q Through what source would you obtain that knowledge?

A The first electric wire.

MR. GLICK: I will concede that answer could be stricken.

Q Mr. Creasy, did you understand my question?

A I thought I did.

MR. GLICK: May I ask that the question be read back to the witness?

(Thereupon the question before the last was read by the reporter.)

Q Do you understand that question? A No.

[109] Q In my previous question, I asked you if you are obliged to know, as foreman, the point where men are supposed to put on their safety equipment, by way of rubber gloves, and you told us yes, you did know. Now, what I would like to know is where did you get this knowledge from, as to where they are supposed to put on the safety equipment. A That comes from the company, of all companies.

Q And is your knowledge limited to only what comes from the companies? A Yes, sir.

Q Now, in view of that, will you tell us at what point it is that a journeyman lineman climbing a pole is obliged to put on his safety equipment?

MR. GINGHER: I object, if your Honor please. He again has thrown it into the field of generality. When he says, "it comes from all companies", he is getting into general practice.

THE COURT: No. He said it came from the company. I presume he meant the Hoosier Company and all companies. Was that in the form of writing, written rules from the company?

THE WITNESS: I believe so, sir.

THE COURT: Right back to the rules.

[110] Q And are you also given instructions by word of mouth? A Yes, sir.

Q And did you receive instruction by word of mouth from

Hoosier? A Yes, sir.

Q Do you know whether Ohio Power Company was aware of any instructions that you received from Hoosier? A No, sir.

MR. GINGHER: Object. I don't know what materiality that could have at all.

MR. GLICK: That becomes very material, Judge.

THE COURT: Well, I will sustain the objection for the reason that the Ohio Power Company is an abstract sort of thing. It is a company. What the Ohio Power knows would have to be known through some officer or agent of the company, and for him to state what the Ohio Power Company knows, would be purely a conclusion.

MR. GLICK: So that we can get this matter clarified -- I say this humbly and apologetically, and not to be argumentative or try to be arbitrary, or appear to be trying to circumvent your ruling -- perhaps we have a slightly different version of the theory of this matter. They have been interposing objections based on a standard created not by the defendant in this case, but by Hoosier. [111] Now, the point is if they are relying on standards created by Hoosier, we have a right to know that, because we are charging them with negligence, and if they have adopted Hoosier's methods as the standard, then we are talking about something entirely different. At this stage of the game, Ohio Power Company is actually acting as Hoosier Engineering Company in this case, and they are purloining standards which did not belong to them.

MR. GINGHER: If your Honor please, I ask the jury be instructed to disregard this statement. We are making

objections and the Court is sustaining them, and if they are sustained by the Court, I presume that is justification for the objection. And I do not appreciate his characterization of what we are doing. We are trying to try this case in an orderly fashion.

MR. GLICK: I did not intend it as a personal situation. I am merely pointing out they are setting forth a position which they are not justly entitled to set forth.

THE COURT: I don't think that is correct. I don't follow your reasoning on that. There is a specific objection made which I think is good and I sustained it. The jury will disregard the argument and we will now take a fifteen-minute recess.

* * *

[Page 131, line 2 - Page 147, line 6]

MR. LOUIS E. CREASY resumed the witness stand and testified further on direct examination as follows:

BY MR. GLICK:

Q Now, Mr. Creasy, how many years were you a lineman prior to your employ by Hoosier Engineering Company? A Just while I was working.

Q Before you were working? A Ten or eleven years.

Q And were you aware of the standards employed by linemen -- journeyman linemen, in climbing a pole with regard to the conduct and the use of paraphernalia for their own safety?

A Yes, sir.

Q Now, can you tell us, based on that knowledge, and -- at what point on a pole it is that a lineman is required to put on rubber

gloves?

MR. GINGHER: I object. It is the same question and the same thing we had before recess, it seems to me.

THE COURT: Yes. I think it is the same question that has been asked two or three times and I sustained the objection, and I sustain it now.

Q Mr. Creasy, is the Hoosier Engineering [132] Company the only one, to your knowledge, who makes a standard for safety of linemen in climbing of poles?

MR. GINGHER: Object. The question is not in proper form in any event.

THE COURT: Sustain the objection.

MR. GLICK: Has your Honor sustained the objection?

THE COURT: Yes, sir.

Q Mr. Creasy, who, if you know, creates the standard by which a lineman guides himself according to safety?

MR. GINGHER: I object.

THE COURT: I will sustain the objection.

Q Do you know what the standards are for safety for a lineman in climbing a pole and using safety equipment in so doing that?

A Yes, sir.

Q Well, now, --

THE COURT: Read the question.

(Thereupon the next to the 1 st question was read by the reporter.)

THE COURT: The question and answer may remain.

Q Now, where did you obtain the knowledge of this standard, Mr. Creasy? A From apprenticeship.

[133] Q Was that prior to the time you worked for Hoosier Engineering Company? A No, sir.

Q When were you an apprentice? A 1927, 1928.

Q Whom did you apprentice for? A Richard and Whalen Company.

Q And after you were apprenticed and became a full fledged lineman, were you made aware of any difference in the standards?

A No, sir.

Q When you went into the employ of the Hoosier Engineering Company, were you told of any difference in the standard that you originally had learned? A Yes, sir.

Q Sir? A Yes, sir.

Q And in what respect was there a difference?

MR. GINGHER: Now, if your Honor please, if he was told, we want to know by whom and when and where, so we can meet it.

THE COURT: I will sustain the objection.

Q Who told you of the difference, or how did you learn of the difference in the standard employed by the Hoosier Engineering Company as opposed to the standard [134] which you had learned as an apprentice and as a journeyman lineman prior to your employ by Hoosier? A Mr. Hale.

Q Who is Mr. Hale? A He is safety director.

Q When was it that you were given such instructions?

A Well, I would say about a year before my brother was hurt.

Q Up until that time, had you been given any special instructions which would differ from the standard which you learned earlier in your apprenticeship and as a lineman? A No, sir.

Q Now, what was the standard which you had learned previously and had been guided by up until a year prior to the injury to your brother?

MR. GINGHER: I object to that.

THE COURT: I will sustain the objection.

Q Well, was there anything in that standard which would prevent a lineman from climbing a pole and getting up on a buckarm without having first put on his rubber gloves?

MR. GINGHER: I object.

THE COURT: Sustain the objection.

[135] Q According to the standard which was in effect on June 25, 1952, can you tell us what the standard was with regard to linemen climbing poles?

MR. GINGHER: We object. It is the same question.

THE COURT: Mr. Glick, I think we have been through this over and over for about an hour. I believe I have made my position clear that I shall limit you to -- so far as acceptable standards are concerned -- to standards that the Hoosier Engineering Company may have had at the time this accident happened, or any acceptable standards such as a standard by unions, if there was any standard fixed by any organization of that kind. This witness has testified that there were rules fixed by the Hoosier Engineering Company. He also stated, I believe, that he got some verbal instructions, some oral instructions. I think, without having to go over this same thing over and over again, that we have to accept the ruling the Court has made on this and go on further.

MR. GLICK: Well, I don't want to belabor the situation,

Judge. I don't want to be admonished by the Court. I think you are absolutely right in reminding me of your rulings, but the last question -- I don't know whether you have realized the impact of that question -- I have asked if he can tell us what the standard was as laid [136] down by Hoosier Engineering Company.

THE COURT: Read the last question.

(Thereupon the last question was read by the reporter.)

THE COURT: Read the one before that.

(Thereupon the question before the last one was read by the reporter.)

THE COURT: What you are talking about is, what the standard was he learned previously It had no relation to the Hoosier Engineering Company.

MR. GLICK: Let me amend that.

Q What was the standard as laid down by the Hoosier Engineering Company?

MR. GINGHER: I object. The standard is not the question.

THE COURT: That comes back to the written rules. If there were written rules, then they are the best evidence. He did say there were some oral instructions. I think it would be proper for him to state what the oral instructions were, if he had any in addition to the written rules.

Q What instructions did you get from the safety man a year prior to the accident, with regard to the climbing by linemen of poles, who were in the employ of Hoosier? A Well, before, we used to climb with our [137] sleeves and rubber gloves on from

the time we left the ground.

THE COURT: Well, what were the instructions?

THE WITNESS: Then I was instructed to not let them do it on account of they found some sleeves snagged with little holes in them.

Q And what were you told to do as a result of that?

A Well, I wouldn't know hardly how to answer that, but I would a-heap rather send them with them on from the time they left the ground on.

Q Now you --

MR. GINGHER: Excuse me. We didn't get his last answer.

(Thereupon the last answer was read by the reporter.)

MR. GLICK: I move to strike out the last part of the answer, on the ground it is voluntary and not responsive to the question.

THE COURT: It may be stricken.

MR. GLICK: Thank you, sir.

Q Now, was there anything that you were told with regard to the point at which rubber gloves were to be put on?

MR. GINGHER: Do you mean by Mr. Hale?

MR. GLICK: By Mr. Hale or anybody else for [138] Hoosier.

MR. GINGHER: I don't want anybody else. I want the time and place and the individual, is the only way we can meet it.

THE COURT: Well, the question is not double-barrelled. Limit it to Mr. Hale first. If you want to, then ask anything

else, you may do so.

Q Do you understand the question, Mr. Creasy?

A Yes, sir.

Q Were you instructed by Mr. Hale or anybody else in charge of safety for Hoosier Engineering Company as to what point on a pole a lineman was to put on his rubber gloves?

MR. GINGHER: I object. You violated the injunction the Court has just given.

THE COURT: I said you must limit the question to Mr. Hale, otherwise it makes it a double-barrelled question.

MR. GLICK: I will withdraw any reference to anyone other than Mr. Hale.

A Mr. Hale told me to put them on when I got to the working point.

Q And what is considered the working point? A The first hot wire.

MR. GINGHER: I object. That is what Mr. Hale [139] said. Is that what we are asking?

THE WITNESS: That's right.

Q Did he tell you what the working point was? A No, sir.

Q Well, in your trade, what is considered the working point?

MR. GINGHER: Object.

THE COURT: Overrule the objection.

A The first hot wire.

Q Now, in going up a pole with an energized or hot wire, if such wire already has safety equipment on it by way of rubber tubing, is it within the standard at that point to put on the rubber gloves?

MR. GINGHER: I object.

THE COURT: Sustain the objection.

Q Well, do you have a standard with reference to passing a point on a pole where there is energized wire which has already been insulated by safety rubber tubing?

MR. GINGHER: We object, as to the standard.

THE COURT: Sustain the objection.

Q Mr. Creasy, you are talking about a hot wire. Will you explain to the Court and jury what you mean by that? A Well, that is a wire that is carrying juice from one point to another.

[140] Q And do you on occasions, when you work with hot wire, put a protective device around the wire? A Yes, sir.

Q And what is that protective device? A Hose, rubber hose.

Q And when that rubber hose is put on the wire, may you proceed beyond that point without having your rubber gloves on?

MR. GINGHER: Object.

THE COURT: Sustain the objection.

MR. GLICK: If your Honor please, I am trying to show what the standard is, what the practice is, and I don't know of any other way that I can show it.

THE COURT: Well, I might suggest a way: That would be to bring in the rules of the company.

MR. GLICK: Well, if your Honor please, that would necessarily be a concession on my part that that is the exclusive method of establishing the standard, and I don't feel that we ought to be bound in that fashion.

THE COURT: You don't need to concede anything, Mr.

Glick. I think the Court has taken that position that a standard had to be a standard that was set by someone or organization, might be by the rules of his company; might be by the union rules or some accepted rules.

MR. GLICK: Would the Bureau of Standards of [141] the United States Government be satisfactory to this Court as a standard?

THE COURT: I don't know. I am not familiar with them.

At this time, we will take our noon recess, until two o'clock.

Thereupon the further proceedings in the trial of this cause were adjourned until 2:00 o'clock of the afternoon of the same day.

AFTERNOON SESSION

THURSDAY, JUNE 21, 1956.

Court met purusant to adjournment The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

And thereupon

MR. LOUIS E. CREASY resumed the witness stand and testified further as on direct examination, as follows:

BY MR. GLICK:

Q Mr. Creasy, you stated the name of the safety man for the Hoosier Engineering Company in your testimony this morning?

A Yes, sir.

Q Talk up. A Yes, sir But I was wrong.

Q Well, now, will you explain to the Court and jury what his name was? A Mr Hill.

Q What did you call him this morning? A Mr Hale.

Q Now, following the accident to Luther on June 25, 1952, did you, sometime during that afternoon, take a photograph of the pole on which he was injured? [143] A Yes, sir.

Q And is this the photograph? A Yes, sir.

Q That you took? A That's right.

Q Whose camera did you take that with? A Banjo Martin's.

Q Now looking at that photograph --

MR. GINGHER: Could we have it marked for identification? And perhaps have an opportunity to see it?

MR. GLICK: Be glad to. I offer this photograph for identification at this time as Plaintiff's Exhibit 7. (Hands photograph to opposite counsel.) Did somebody put a mark on this?

MR. GINGHER: No. We only had pencils.

MR. GLICK: Mark this one for identification as 7.

[Thereupon a photograph was marked for identification as Plaintiff's Exhibit No. 7.]

Q Now, Mr. Creasy, referring you to Plaintiff's Exhibit 7, there are two poles in that photograph, are there not?

A Yes, sir.

Q Now, which pole is it in this photograph, indicating by left or right, that Luther was injured on? [144] A The left one.

Q Now, I will ask you if you will mark an "x" at the base of the pole that you are referring to? Can you put an "x" on the pole that you mean? A On that pole there. (Witness puts an "x" on Plaintiff's Exhibit No. 7).

Q Thank you. Now, I direct your attention to the upper portion of that pole where there are some wires strung with what appear to be mats or blankets hung up. A That is blankets.

Q Now, were those blankets on the lines when Luther went up the pole, or when he was seen on the wires up there?

A Two outside ones wasn't on.

Q The two outside lines? A They were not on.

Q When you talk about the outside ones, do you mean the ones farthest from the pole? A That's right.

THE COURT: Are you talking about lines or blankets?

MR. GLICK: These are blankets on the outside. I mean the lines, whether they have the blankets on them. If he did not make that clear, I am glad you called that to my attention. Could I have the question so we can clarify [145] it?

(Thereupon the last question was read by the reporter.)

Q By the two outside lines, you mean the two lines farthest from the pole? A That's right.

Q Now, did those two lines have these blankets on them at the time that your brother Luther was going up the pole that afternoon? A No.

Q Were they on the lines, that is, the two outside lines, at the time when you saw him on those wires? A No.

Q Were there any blankets at all on any of those three lines at the time you saw him go up the pole? A The inside phase

was covered.

Q Is that what you call a line, a phase? A Yes.

Q I direct your attention to other lines underneath the three that are depicted in this photograph as having the blankets or mats over them, which lines run lower on the pole, and I ask you what it is that appears on those lines which appear to be somewhat thicker than the line itself? A That is a hose.

Q What kind of a hose is that? [146] A Rubber hose.

Q And how does that hose get on the line? A Linemen puts them on.

Q And what is the purpose in their putting hose on the line in that fashion in the proximity to the pole? A That is for safety, to climb above it.

Q And once this hose is on the line, the safety factor is completed?

MR. GINGHER: I object

A Completed

MR. GINGHER: Just a minute.

THE COURT: Well, it was a leading question. Let the witness testify, please. I will let the answer remain in.

MR. GINGHER: What was the answer?

(Thereupon the last answer was read by the reporter.)

MR. GLICK: I now offer this photograph in evidence, your Honor.

THE COURT: It may be admitted.

(Thereupon said photograph was admitted in evidence as Plaintiff's Exhibit No. 7.)

MR. GLICK: May we exhibit this to the jury now?

THE COURT: Yes

[147] (Thereupon Plaintiff's Exhibit No. 7 was passed to the jury.)

MR. GLICK: No further questions at this time of this witness, sir

CROSS-EXAMINATION BY MR. GINGHER:

* * *

[Page 164, line 20 - Page 185, line 14]

Q Now, tell me how much of this work had been completed before your brother was hurt that day? Just tell us how far the job had gone, how much work had been done up on that pole?

A That pole was finished, as far as I was concerned.

[165] Q You had completed it and the men had been up and down that pole many times? A That's right.

Q Installing the hardware, and they had stood on those crossarms many times, one or more of them, had they not?

A Yes.

Q Luther had been up on that pole before the day he was hurt? A A couple of or three days before.

Q He had been up on the pole and what was the nature of the work that he was doing? A Changing them clamps.

Q Changing clamps. Now, where were the clamps located, were they on the top crossarm? A Some was on the top, some was in the middle and some was on the bottom

Q Now, was Luther the man assigned to change the clamps?

A That day, he was.

Q You say two or three days before he had been up doing that; is that right? A He dead-ended.

Q He was dead-ending and changing the clamps two or three days before? [166] A No He dead-ended two or three days before.

Q All right. He dead-ended two or three days before, and he dead-ended on the top crossarm? A That's right.

Q And in order to do that, he would stand on the middle crossarm? A Yes, or on the pole. Lot of times he would stand on the pole.

Q Do you know which he stood on? A I don't know.

Q In any event, he was up on that pole on several occasions? A That's right

Q Before he was hurt? A That's right.

Q And other men were up on it? A Yes.

Q Would you say most of your crew had been up on it? A I would say most every lineman I had had been up and down that pole.

Q Was that before or after he was hurt? A Yes, sir.

Q Now, did all of these lines dead end? [167] A All except on the bottom line. I am not sure at that.

Q Will you take a look at -- now I am handing you Defendant's Exhibit A. Will you take a look at that and see if that will help you as to what lines dead ended and which ones went through? A The ones on the bottom arm, on the left side went through.

Q And the others dead-ended? A That's right.

MR. GINGHER: Mark this as Defendant's Exhibit G.

(Thereupon a document was marked for identification as Defendant's Exhibit G.

Q Mr. Creasy, I hand you what has been marked as

Defendant's Exhibit G. Will you state what that is? A That is a work order.

Q And is that the work order for this job? A For this job.

Q And does it bear your signature at the top in your handwriting? A Yes, sir.

Q Now, this was received before the job started?

A Yes, sir.

[168] MR. GLICK: So that we may have the record clear, I think we ought to indicate how many sheets are involved in this exhibit, Mr. Gingher.

MR. GINGHER: Beg your pardon?

MR. GLICK: Shouldn't the record show how many sheets are involved in this exhibit for the purpose of clarifying the record?

MR. GINGHER: Yes, I think it should. Thank you. Mark it as Defendant's Exhibit G-1, G-2, G-3, G-4 and G-5.

(Thereupon each sheet of Defendant's Exhibit G for identification was marked as Defendant's Exhibit G-1, G-2, G-3, G-4 and G-5, respectively.)

MR. GLICK: There is one other thing I would like to call to your attention, that is the last sheet. Is that considered also part of the work order, or is that some type of tracing or drawing?

MR. GINGHER: We will ask the witness.

Q Is that last sheet part of the work order? Does it come with the work order? A Yes, that comes with the work order.

Q Now, I notice at the top of each sheet, it has your

signature and the words written "All work done hot"? A That's right.

[169] Q That is written by you? A That's right.

Q And by "hot", it means that the wires were hot and were energized with electricity? A That's right.

Q As the work was being done? A Yes, sir.

Q And that was the way you understood it before the work started? A That's right.

Q Now, I have a purpose for asking this: Are you a member of the union? A Yes, sir.

Q And, as a matter of fact, all the linemen were members of the union, were they not? A No, sir.

Q Was your brother a member of the union? A Yes, sir.

MR. GINGHER: Mark this as Defendant's Exhibit H.

(Thereupon a booklet was marked for identification as Defendant's Exhibit H.)

MR. GINGHER: Now, if your Honor please, I have an exhibit which has been marked for identification as Exhibit H which has marks through it. It is almost [170] impossible to remove them. We will try, however, before it gets to the jury to remove them as much as we can, but in the interest of time, I will not try to do it now, but I do want to interrogate the witness concerning it.

MR. GLICK: Which phases of this booklet are you referring to?

MR. GINGHER: Well, 7-e, Rule 7-e and Rule 7-f, 12-b and 17-a.

MR. GLICK: Rule what?

MR. GINGHER: 7-e, 7-f, 12-b and 17-a.

Q I hand you what has been marked as Defendant's Exhibit H, and it appears to be safety rules compiled by the joint committee provided for under Rule 16 of the Memorandum of Understanding between Electrical Contractors and Local Unions of the International Brotherhood of Electrical Workers. Now, that is the union of which you are a member and these appear to be safety rules?

A That's right.

MR. GLICK: Talk up, Mr. Creasy.

THE WITNESS: I said, "That's right."

Q Now, these rules were furnished to all the members, particularly the foremen? A Yes, sir.

Q Now referring to rule 7, 7-e, that says: [171] "All rubber protective equipment shall be inspected frequently for defects and periodically must be tested electrically at the laboratory; and if found defective, shall be rendered unfit for further electrical use by the party making the laboratory test" and so forth. You remember that rule? A That's right.

Q Now, Rule 7-f, see if you remember this rule. And these were the rules that were supposed to be followed in work. That's right, isn't it? A Yes, sir.

Q Rule f: "When working on or near live conductors or other live apparatus, operating at voltages above 300 volts, the use of rubber protective equipment for protection is positively required." That is the rule, isn't it? A That's right.

Q Now, it says: ". . . above 300 volts". Were you dealing with voltage that was above 300 volts? A Yes, sir.

Q Now, as I understand it, you say that some of the wires on the top were covered and some were not, and I would like to have you clear up for me which was and which was not. A Two outside wires on the top arm, farthest [172] away.

MR. GLICK: The two outside lines were what?

THE WITNESS: Was not covered.

Q Now, I am looking at Rule 12-b. "When work to be performed on energized wires requires workmen to reach past other wires to reach the ones to be worked upon, all wires between themselves and the wires to be worked upon shall be covered with approved rubber protective equipment. The protective equipment shall not be removed until the work is completed." Is that part of the rule? A That is part of it.

Q And those rules were governing the work that was being done at the time your brother was hurt? A Yes, sir.

Q Now, Rule 17-a, it says, "Linemen, before starting to work, if not familiar with the voltages and positions of the circuits to be worked on, shall get proper information from the foreman. The foreman in charge of the job shall satisfy himself that the workman fully understands the nature of the work to be done." Is that part of the rule? A That is part of the rule.

MR. GLICK: Are you through with that?

MR. GINGHER: For a moment, yes.

Q By the way, there is one point I neglected [173] to ask you about before. These crossarms, what is the distance between them? A On 2300 and 4000 they run 2-foot bucks.

Q So that, when you had three crossarms here, they were two feet apart? A That's right.

Q Therefore, when a man stands on the second or middle crossarm, the upper crossarm would come about to his knees, wouldn't it? A I would say it would.

Q Yes. So that, if your brother was standing on that crossarm, the other one above him would be at about his knees. That's right? A I would say that was right.

Q Now, does the pole stop at the top crossarm? A That one did.

Q So that, if he is standing on that crossarm, there is nothing around him except the other crossarm and the pole, and that would be at about the top of the pole and crossarm would be at about his knees? A And the wires.

Q And the wires running from the crossarm, but they would not be any higher? A Yes, they would be a little higher. They [174] set on 6-inch pin with insulator.

Q The wires would be 6 inches above the crossarm. Were there any wires on the crossarm on which your brother was standing just before this accident occurred? A Yes, sir.

Q There were wires on that? A Yes, sir.

Q Were they hot? A They was hot.

Q So that he had come up through -- as a matter of fact, there were hot wires that ran past the pole and close to it, they were not attached to the pole? A Yes, sir.

Q He had to go up through those? A Yes, sir.

Q How close were they to the pole? A Some pretty close, touching the pole.

Q You mean there was a hot wire touching the pole that he went up? A With a hose on it.

Q Well, that hose only extended a short distance, didn't it, like this hose? A That's right

Q What was that, about five feet -- four or [175] five feet? A No, a little longer than that.

Q How long do you say? A I would say they are six feet hose; some of them is longer.

Q It would only be three feet on each side of the pole then, wouldn't it? A That's right.

Q So, you say he came up the pole with the rubber hose on it, only three feet on either side of the pole. It wouldn't be quite that much, if you consider the diameter of the pole. A That I don't know.

Q What is the diameter of the pole? A Depends on what class it is.

Q This pole we are talking about? A I don't know that.

Q Six inches, or eight inches? A I would say it is 8-inch.

Q So you would take that off to get the distance that the hose would extend beyond the pole, wouldn't you? A That's right.

Q So he went up with that wire probably touching the pole? [176] A Wire wasn't touching the pole. The hose was on it.

Q Well, the hose was touching the pole? A Yes.

Q And there was more than one? A Yes.

Q On both sides? A I wouldn't say on both sides.

Q Let's look at the picture and see if that will help. Now, we are referring to Defendant's Exhibit A. That shows those wires running up the pole, does it, that are not attached to it?

A That's right.

Q And how many were there? A Three there, on the lower side. Three up next to the arm.

Q But those running below the lowest arm, all of them, aren't they? A No.

Q No. Pardon me. I am talking about the lines. There is a line goes up there that is not attached to this pole?

A That's right.

Q How many lines go up that are not attached to the pole?

[177] A That I wouldn't say. There are four, to my best recollection.

Q Well, now, how close were they to the pole? A Well one was pretty close, the one with the long hose on.

Q Was pretty close. The others were some further distance? A Yes.

Q Do you know how far? A No, I wouldn't say.

Q Now then, there were hot wires on the lowest crossarm?

A Yes, sir.

Q On both sides? A Both sides.

Q Then there were hot wires on the next one?

A Yes, sir.

Q Now that was at an angle, wasn't it? A Well, I don't recall there being any angle.

Q You think they were all through right together all the same way? A In other words, I mean the pole was straight and the wires going through, wasn't no angle on it.

[178] Q Now, let's look at Exhibit A again. Isn't it that center arm that was not running the same as the— A That is what we

call the "buck" arm.

Q That was at an angle? A No, we put them on square, no angle, any time we take off to go down the alley or cross the street.

Q You mean it is at right angles with the others?

A Yes.

Q It doesn't appear to be, in that picture, does it?

A No, sir.

Q Were there any hot wires in that? A Hot wires all around it.

Q Hot wires all around it. Now then, when he got up on that buck arm, or the middle crossarm, he would stand on that; is that your understanding? A Yes, sir.

Q Did you see him standing on it? A No, sir.

Q Now, just how would he be secured to the pole? Just tell the jury how that would be. A Well, he would be --

MR. GLICK: Just a moment. If the witness [179] is being asked to testify as to his actual knowledge, I have no objection. If he is being asked to speculate, I do have objection.

THE COURT: All right. If he doesn't know—

MR. GLICK: The form of the question as put, would make it very difficult to know in advance whether he is being asked of his own knowledge, or whether he is being asked to give an opinion.

THE COURT: He stated he did not see him up there, so presumably he would not know.

Q How did the men, when they stood on that arm, -- you

saw men stand on that arm during the course of that work, did you not? A I have.

Q Now, how did they support themselves? A Ain't any man standing on the arm the same way.

Q You mean some of them stand up there without being tied into the pole? A No, they tie into the pole, all of them.

Q All right. Now there is something goes around the pole? A That is what we call the safety strap.

Q Then there is a line from that, is there, thing that goes around the pole? [180] A That comes back to your body belt.

Q That double line then comes to your body belt and your body belt is tight, is it? A Yes.

Q And that hooks on there? A That's right.

Q How much distance is there between the pole and the man? A They carry six feet and for safety, it is hard to tell how far they keep them out.

Q They can regulate it so that they come out so far? A That's right.

Q The maximum is six feet? A They can go out as far as six feet or a little better.

Q Now, standing out that way, did the men you saw there, and did you as you worked, -- do you have to balance yourself? A Yes, you balance yourself.

Q You have to balance yourself, you have nothing to hold to? A That's right.

Q So that a man working there would stand in that position with nothing to hold to; is that right?

[181] MR. GLICK: Just a moment. Are we talking about some

speculative situation, or are we talking about a fixed point of work?

THE COURT: I believe he is talking about a fixed point on this particular pole and crossarm, and the men as he had seen them stand there.

MR. GINGHER: Yes. And there is testimony in this case to the effect plaintiff was standing on that arm. At least, the statement has been made.

MR. GLICK: In the opening statement, that is true. There is no testimony in the record that I am aware.

THE COURT: I am not sure whether the witness yesterday, whether he saw it, where he was standing or not.

MR. GLICK: Mewhorter only testified to the fact, as I understand it, -- my recollection is that he saw him being held there after he had seen him on the wire, but I don't think there is any testimony in the record at this stage indicating that Creasy was standing on the crossarm itself, other than the fact that these marks on the arm, after Mewhorter went up there.

THE COURT: Those marks on which, the middle crossarm?

MR. GLICK: The buckarm.

MR. GINGHER: Yes, there was testimony to the [182] effect, I believe, they were spike marks, and I will ask the witness.

Q Is it spike marks, what they call them when they spike in?

A Yes, sir.

Q When they stand on the crossarm, have you ever seen any of them -- have the men put spikes on the crossarm? A I

have put spikes in them myself.

Q So, if there had been marks on the crossarm and men had been on it, you wouldn't know when those marks got there, would you?

MR. GLICK: We are talking about two different things in spike marks. The witness Mewhorter didn't say they were spike marks in that they were holes punches in from a spike. I think, as he described it, there were these marks indicating there were spike marks across the arm.

THE COURT: He did not say that.

MR. GLICK: At least, that is my recollection. If I am wrong about it, I am not intending to misrepresent, but I think the record will bear out in part what I say.

THE COURT: Well, I think the last question asked by Mr. Gingher probably called for a conclusion.

MR. GINGHER: Perhaps it was argumentative.

[183] Q Did all the men who went up on the pole have spikes on? A Yes, sir.

Q And the men who stood on that crossarm before, had their spikes on? A Yes, sir, if he stood on it. I don't know whether they stood on it.

Q They were equipped with spikes? A Yes.

Q They had to be to get up the pole, didn't they? A That's right.

Q Now, what was the specific work that Luther was going up to do just before he was hurt? A To change the clamps.

Q And he was going to change the clamps on the top crossarm? A On the outside phase.

Q Outside phase of the top crossarm? A That's right.

Q Now, he could have done that work spiked to the pole, couldn't he? A That I don't know.

MR. GLICK: I object on the ground it becomes a question of speculation now.

[184] MR. GINGHER: He was in charge of the work.

THE COURT: I think the witness would know. He can answer whether or not he did know.

Q He could have done that work spiked to the pole, couldn't he? A That I hate to say.

Q Why would you hate to say so? A Because a lot of times I can do it by being on the pole where the other guy has to stand up.

Q You mean one man might be able to do it and the other man might not be able to do it? A That's right.

Q You were very familiar with the kind of work your brother could do? A Yes.

Q He was a very good man? A Good man.

Q Wouldn't he be able to do what you were able to do on that pole?

MR. GLICK: He is being asked to evaluate the operation of somebody's mind or physical characteristics.

MR. GINGHER: From his own observation of a man who worked under him.

THE COURT: Sustain the objection.

Q Did he have the ability as a lineman to [185] have done that work spiked to the pole?

MR. GLICK: If your Honor please, I object

A I say he could have.

THE COURT: I will overrule that objection.

MR. GINGHER: Read the answer, please.

(Thereupon the last answer was read by the reporter.)

MR. GINGHER: Mark this as defendant's Exhibit I.

(Thereupon a document of Safety Rules was marked for identification as Defendant's Exhibit I.)

MR. GINGHER: I have an exhibit which purports to be safety rules of the company. I don't know what length of time they want to examine it.

* * *

[Page 186, line 23 - Page 198, line 15]

Q Now, I believe you testified that you called attention to the fact that there was some bad -- the wrong kind of clamps?

[187] A Yes, sir.

Q It was your job to see that the material sent to you was proper for the job, was it not? A No. That was Jim's job.

Q Well, but you called this to Jim's attention, didn't you? A Yes, sir.

Q Well, then, as foreman, you were calling to the attention of Mr. Long, when you say Jim, the company engineer, that that was not the right material? A That's right.

Q And it was your job to call it to his attention whenever anything was wrong with what was sent to the job? A That's right.

Q Now you say, that you wanted this current to be on manual. I am not much of an electrician and you will have to help me. Are you sure it was not on manual? A I am sure

Q You are very positive of that? A Positive.

Q Now, I have here what has been marked as Defendant's Exhibit I, which appears to be general safety rules, and, as I understand it, these are the rules of the [188] Hoosier Engineering Company in effect at the time your brother was hurt. Now this is a general safety rule and you also had safety meetings from time-to-time, did you not?

MR. GLICK: Just a minute. I didn't hear any answer to the previous question.

THE COURT: I don't know whether you are asking him to identify this as the rules.

MR. GINGHER: No, I didn't ask him to identify them because I couldn't in this form. I will have to ask him whether certain rules are the rules of the Hoosier Engineering Company in effect at that time.

Q There were safety rules, were there not? A That's right.

Q And you did have safety meetings from time-to-time? A Yes, sir.

Q And you had safety meetings with some regularity? A Yes, sir.

Q Perhaps every month or so? A Every couple of months, anyway.

Q And if it rains or the weather was bad, you would have safety meetings on those days, wouldn't you, when the men couldn't work? A Yes, sir.

[189] Q In any event, it was a regular thing to have safety meetings? A Yes, sir

Q And the Engineering Company had certain safety rules?

A Yes, sir.

Q Now, there was in those rules the responsibilities of supervisors, was there not? A Yes, sir.

MR GLICK: Keep your voice up, Mr. Creasy.

Q I will ask you if these were not the rules and responsibility of supervisors: "It is the definite responsibility of the officers, superintendents, foremen and others in charge of company operations, to see:

"(a) That working conditions are safe.

"(b) That all tools and equipment are in good condition.

"(c) That work is carried out in a safe manner, and in accordance with the safety precautions and instructions outlined in the manual, where such apply, and to use your common sense.

"(d) That their workmen are at all times kept familiar with the general and special precautions and instructions applying to [190] their work.

"(e) That anyone under their supervision shall not be allowed to do any work without providing proper safeguards against all dangers which may reasonably be expected

"(f) That all unsafe conditions are investigated and made safe before workmen are permitted to proceed with the work

"(g) That no employe shall be given a job which, in the opinion of the person in charge, he is not capable of doing with safety."

A Yes, sir.

Q Those were the regulations?

MR. GLICK: Now, if your Honor please, these were the regulations. I think it should be made clear with regard to the supervisor.

THE COURT: I think that was clear. That is what he read.

MR. GINGHER: That is exactly what I said.

Q Now, there were rules for energized work, were there not? A Yes, sir.

Q And those rules, see if I am not reading to you the rules as you understood them: "Rubber protective equipment is required in working voltages of [191] 300 volts or lower at the discretion of the man in charge." A Yes, sir.

Q Now, "Rubber protective equipment is positively required when working on all live lines in excess of 300 volts up to and including 6900 delta." A Yes, sir.

Q These lines came within that range? A Yes, sir.

Q Then it says something about "hot sticks", but that would not apply in this case? A No

Q Now, I should like to have you look at the exhibit again, Defendant's Exhibit A, where the rubber hose is on the wire. It would indicate that some of that wire is exposed close to the pole or transformer, wouldn't it? A Yes, sir.

Q So, when you apply the rubber hose, there is no way to attach that to the end line so that there isn't the chance for some exposure of the wire possible Is that not right? A Would you say that again?

Q I say, when you put the rubber hose on, you can't push it clear against the transformer or the fuse, that there is frequently, as in that picture, some small part of the wire still exposed between the end and the pole [192] or the transformer? A You can still push it up close.

Q Yes. But frequently, it is not pushed up close?

A That's right.

Q And it was not pushed up close there, was it?

A Not there it ain't.

MR. GLICK: Just a minute. Are we referring to the wires?

MR. GINGHER: To the exhibit.

A I could have took the hoods off of that.

MR. GLICK: What wires are we referring to on this photograph?

MR. GINGHER: Referring to the wires that are covered with the hose that show in the picture. It shows in the picture that part of the wire is still exposed between the end of the hose and the transformer or the crossarm.

MR. GLICK: I submit--

Q It shows that, does it not? A It shows that.

THE COURT: Does that purport to be a picture of the condition taken that day?

MR. GINGHER: Yes, that has been established.

[193] MR. GLICK: But not with regard to the wires that we are dealing with We are dealing with the upper phase of the wires on the upper arm He is talking about some phase on an entirely different arm

MR. GINGHER: But I have it for another purpose.

THE COURT: Same pole?

MR. GINGHER: It is the same pole.

THE COURT: All right.

MR. GINGHER: And there is testimony about the covered wires and the effect of it.

THE WITNESS: I can explain that wire. The hoods or the hose had been moved back after the lineman had left the pole so they don't contact the insulator over night until he got back.

Q But, as a matter of fact, sometimes they are not tight when men are working on them; is that right?

MR. GLICK: Object.

A No.

MR. GLICK: I object on the ground of the word "sometimes" is included and we are not dealing with his speculative situation.

THE COURT: I will overrule the objection.

MR. GINGHER: Was the objection sustained?

THE COURT: No. I overruled it.

[194] MR. GINGHER: Will you read the question to him, please?

(Thereupon the last question was read by the reporter.)

Q And, of course, the hose would not go over the insulator itself? A Yes.

Q You say it would? A You can push it up over the insulator.

Q But in the exhibit which I have shown you, it was not

pushed up over the insulator, was it? A No.

Q Now, therefore, when the men worked on even the wires that were covered, they were required by the safety rules and by you to have on their rubber gloves, weren't they? A Yes, sir.

Q So that, under these safety rules and the precautions to be taken and the instructions given you by Hoosier, there was no difference whether the wire was covered or not? The question was, was it hot? Isn't that right? A That's right.

MR. GINGHER: That is all.

[195] REDIRECT EXAMINATION BY MR. GLICK:

Q Mr. Creasy, when Luther went up the pole that day, did he have on rubber boots of the fashion or type as has been marked here for identification as Defendant's Exhibit D-1 and D-2?

A Yes, sir.

Q And did he have along with him and as part of his equipment, the rubber gloves which you have identified here with the leather gloves, the rubber sleeves in the canvas bag, as marked Defendant's Exhibit F? A Yes, sir

MR. GLICK: And, Mr. Gingher, if you will let me have Hoosier's rules that you are reading from—

MR. GINGHER: I think the stenographer has them there.

Q When Mr. Gingher was reading to you certain rules of the Hoosier Engineering Company, he did not read to you Rule 4(b) which states "Neither rubber gloves nor rubber sleeves should be worn when climbing up or climbing down a pole below the primary area", did he? A No, sir.

Q And according to Hoosier's rules, as it appears in Defendant's Exhibit I here, Hoosier definitely [196] instructed then that

men should not wear rubber gloves and rubber sleeves when climbing? A Yes, sir

Q Now, there is nothing in the rules that you are aware of which states at what point the man must put on his safety equipment, such as his rubber gloves and rubber sleeves?

MR. GINGHER: I object

THE COURT: I will sustain the objection.

Q Well, now, in view of these rules, as I know them, do you know of any rule of the company which states at what point the rubber gloves and rubber sleeves must be put on?--

MR. GINGHER: Object.

Q (Continued) --by the linemen?

MR. GINGHER: It is in the rule.

THE COURT: He asked whether or not he knows of it.

Q Do you know of it? A Yes, sir.

Q And what is it? A When he gets to his working point.

Q What would the working point be? A Where Luther got hurt at.

Q Would that be the buckarm? [197] A That would be the top arm.

MR. GINGHER: I move that be stricken because he is attempting to interpret the rules and the rules do not say that. He just read the rule to him. It is completely contrary to the rule which is submitted.

THE COURT: Is that one of the rules you read to him?

MR. GINGHER: No, it is a rule which he says I didn't read but which he read to him.

MR. GLICK: Yes, but you had it marked as an exhibit.

MR. GINGHER: Yes, that is true. But the question is inconsistent with the rule, and he is attempting to interpret the rule.

THE COURT: The rule will speak for itself, I think.

MR. GINGHER: That is what I am saying. He is asking him to interpret and I move the answer be stricken.

THE COURT: It may be stricken.

MR. GLICK: Now, if your Honor please, may I have some understanding of the basis of the Court's ruling?

MR. GINGHER: I would like to show the Court the rule. (Shows rule to the Court.)

THE COURT: You asked the basis of my ruling. [198] The ruling is based on the fact that the rule speaks for itself, and is not subject to interpretation by the witness.

Q Mr. Creasy, was there, over a period of time, a practice of linemen working for Hoosier where they reached a point of work, such as on a buck arm, and then at that point put on the rubber sleeves and rubber gloves?

MR. GINGHER: I object.

THE COURT: Sustain the objection.

MR. GLICK: I would like for the record to indicate we want to show that there has been a course of practice in existence over a sufficient period of time with regard to what I am trying to establish, and I submit that becomes evidential in spite of any rule to be evaluated with regard to the effectiveness of the rule.

* * *

[Page 199, line 10 - Page 201, line 12]

Q Now, Mr. Creasy, assuming that you are going up into an area to work and in order to work in that area because of energized lines, you are going to put a hose, such as has been marked into evidence by identification -- now, before you can start to put on this hose, or any other rubber goods of a protective nature, is it necessary that you put on your personal protection, such as the gloves and rubber sleeves? A No, if it has already been covered, according to the working point.

Q When you get beyond that stage, such as the point where Luther had reached, on the upper arm and he was required to put protective equipment on the wire? A That is right.

Q Is it not so that he must first put on his rubber equipment for his personal safety? [200] A Right.

Q Such as his gloves and sleeves? A Right.

Q And then proceed to put on the rubber protection on the line? A That is correct.

Q Now, Mr. Gingher asked you whether, in your opinion, your brother Luther could not have done this work that he was supposedly engaged in at the time, to go up to change the clamps on the outside phase, whether he could not have done that work spiked into the pole? A That I wouldn't know.

Q Now, is this work necessarily done by spiking into the pole? A No, not every time.

Q And is there any particular regulation which says that you should spike into the pole to do the work that way?

MR. GINGHER: Object. The regulations would speak for themselves.

MR. GLICK: I think he is entitled to tell us whether there is such a regulation.

THE COURT: Well, if he knows whether or not, he may answer.

Q Do you know whether or not there is any [201] regulation requiring that? A Not that I know of.

Q And is it the usual practice under such circumstance for a man to select whichever way he best can do the work in?

A That's right.

MR. GINGHER: Object.

THE COURT: Overrule the objection.

Q So that, there is no set or fixed way, according to the rules, by which he has to affix himself to do the work, is there?

A No, sir.

* * *

[Page 202, line 2 - Page 206, line 14]

Q Now, is it permissible in view of that situation, to stand on a buck arm to do the work?

MR. GINGHER: Object.

THE COURT: I will overrule the objection.

MR. GLICK: Do you understand the question?

THE WITNESS: I didn't get it

MR. GLICK: Pay a little attention, please.

THE COURT: Restate your question. I think it would be a little better and state a question without leading the witness.

MR. GLICK: What was the question, please?

(Thereupon the last question was read by the reporter.)

A Yes.

MR. GLICK: You may do that. No further questions at this time. Just one question.

Q Is there anything in your union rules dealing with the clearance on wires, on lines or phases? A Yes, sir.

Q Did Mr. Gingher call that to your attention? A No, sir.

Q I am referring now to Defendant's Exhibit H, referring to page 14 thereof—

MR. GLICK: I have no further questions at this time.

RECROSS EXAMINATION BY MR. GINGHER:

Q Just one or two questions, Mr. Creasy. What do you understand by the "primary area"? A Well, I know she was hot.

Q How's that? A I know the wires was hot.

Q Isn't the primary area from the first hot wire up to the top one? A That's right.

Q That is the primary area. And whenever a man gets within the primary area, he is supposed to wear his protective equipment under the rules? A Not if I had somebody up and they had been covered up to that point.

Q Well, they had not been covered, had they? A Yes, they had been covered all the way to the top, except the two outside.

Q You just told me that they were supposed to wear their protective equipment whether the rubber hose was on or not.

A At times they do and some don't.

Q But the rule says they should? A You shouldn't climb in them.

Q Yes Now, the rule of climbing says, [204] "Neither rubber gloves nor rubber sleeves should be worn when climbing up or climbing down a pole below the primary area." A That's right.

Q Now, the primary area, you just told me, was from the lowest hot wire to the top hot wire. A That's right, but I can explain that to you.

Q All right, you explain. A Once it has two men been up that pole, and it has been rubbered up from bottom to top, if I send somebody else up after dinner, which was done, it is not required for him to put them hot rubber sleeves and gloves on from there to the top of that pole. He can wear his leather gloves until he gets to where he is going to work.

Q Didn't you just tell me even where the rubber is on some of the wire is exposed at times? A Not if they are working them and get that pushed on as they go up.

Q Some of these in the picture were not pushed on.

A They wasn't working on that pole at that time either Can you show me a man on that pole?

Q No, I can't show you a man on that picture A You can on the one I took

[205] Q Was there a man on the pole? A Yes.

Q Well, there are things on the pole then that were put on later after this happened? A Just them two blankets.

MR. GLICK: If your Honor please, this is becoming argumentative

THE COURT: Yes, I think you are getting into argument with the witness The rule speaks for itself, and he has

described the primary area from the first hot wire to the top.

MR. GINGHER: Very well.

MR. GLICK: I think also, your Honor, since the comment is made by the Court that Mr. Gingher voluntarily exposed himself to an answer which he has gotten with regard to the witness' experience on an interpretation of the rule about the climbing up to a point where they can start work where the wire is covered.

THE COURT: I don't understand what you are saying.

MR. GLICK: Mr. Gingher just put about four questions prior to that -- asked Mr. Creasy to explain himself about a certain condition. Mr. Creasy said he could explain something. He said go ahead and explain it. [206] He elicited an answer and Mr. Creasy went on and told him that the wire has already been covered up.

THE COURT: He asked the question and he got the answer. I see no point in talking about it.

MR. GLICK: I thought your Honor was limiting the application of this testimony to the rule itself.

MR. GINGHER: We have nothing further, your Honor.

MR. GLICK: No further questions.

and thereupon

MR. MARION MASON MARTIN , being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GLICK:

* * *

[Page 207, lines 8 and 9]

Q Mr. Martin, will you state your full name?

A Marion Mason Martin.

* * *

[Page 207, line 14 - Page 213, line 15]

Q * * * Are you the gentleman that they refer to as Banjo?

A That's right.

Q Where do you live? A At Mt. Victory, Ohio.

Q Were you working for the Hoosier Engineering Company on June 25, 1952 at Hicksville, Ohio? A I was.

Q And what was the nature of your work, Mr. Martin?

A Lineman.

Q Lineman? [208] A That's right.

Q And do you recall an incident occurring involving Luther Creasy on June 25, 1952? A I do.

Q Can you tell us what time of the day it was that this incident occurred? A Not exactly. In the afternoon.

Q Well, can you tell us with reasonable proximity what time of the day it occurred in? A Around two o'clock.

Q And do you recall what the weather conditions were on that day? A Very hot.

Q And was the sun shining or was it a cloudy day?

A Sun was shining, hot.

Q Was there any interference at all from the clouds in the air where you were working? A Not that I recall.

Q And how long have you been working as a lineman, Mr. Martin? A Since 1928, off and on.

Q Now, did you see the accident that Luther was involved in? A No.

[209] Q And how was the accident made apparent to you?

A Well, from the yelling of the foreman for some help

Q Is that what first attracted your attention? A That is what first attracted my attention.

Q And when you heard the foreman yell, what did you do?

A I got out of the patch of elderberry bushes and saw what happened, and he ordered another fellow and I up the pole.

Q What I want to know is, what did you see?

A After he told us to go up the pole, a young fellow was holding Luke away from the phase.

Q When you say "Luke", is that what Luther Creasy is called by the workingmen? A That's right.

Q You say that he was pulled away from the phase?

A Right.

Q And what do you mean by "phase", Mr. Martin?

A Conductors that is on the arms.

Q Now, do you know how much voltage those [210] wires were carrying? A I was told it was 4160.

Q And did you go up the pole? A Yes.

Q And how high was the pole? A I would judge it was 55-foot pole, with 8 feet in the ground.

Q 55-foot pole and what? A With 8 feet in the ground. I would judge that is what it is. I could be wrong.

Q Now, you say you heard the foreman yell and that is what attracted your attention? A That's right.

Q What was he yelling and to whom, if you know?

A To the man on the pole to knock Luther loose to break the contact.

Q And who was the man on the pole? A Edgar Aldrich.

Q Does he have a name? A They call him Sonny.

Q Now, when you went up the pole, did you observe the condition of the buck arm that Luther had been on? A Not until he was removed to the ground. [211] Afterward you could see where Luther had slipped from the arm

MR. GINGHER: We move that be stricken.

THE COURT. It may be stricken.

Q Just tell us what you saw on the arm. A Spur marks across the arm.

Q How many did you see? A One mark.

Q Just tell us in your own words how they ran, across the arm, or in straight or irregular pattern? A It was very nearly a straight line where he would make a straight slide.

Q That went right to the edge of the arm? A Clear across the arm.

MR. GINGHER: I will have to ask that be stricken, the references to slide and so forth. I think he is required, under the former ruling of the Court, to describe what he saw and not his conclusions.

MR. GLICK: I asked him if it went to the edge of the arm.

THE COURT: I think there was one statement in his answer that probably should be stricken. Read his answer, will you, Miss Fischer?

(Thereupon the last two answers were read by the reporter.)

[212] THE COURT: "Where he would make a straight slide" may be stricken.

MR. GLICK: I will consent to that.

Q Were there any other marks on the buck arm?

A Not that I recall.

Q Now, when you went up the pole, Mr. Martin, was there any rubber protective equipment on the upper phase, the upper three phases, that is, on the top crossarm? A I don't remember. I was excited.

Q Did you subsequently go up the pole after Luther had been taken down? A No. I stayed up after he was taken down.

Q Who took him down? A I helped put him on little Bob Mewhorter below and Bob took him down, with the assistance of a hangline in his D rings on his belt.

Q Are those those metal rings that have been referred to as hooking into the protective belt? A Yes.

Q That is worn by a lineman? A Right.

Q I show you Plaintiff's Exhibit No. 7 and direct your attention to certain mats or blankets. A These are little blankets and these are [213] little -- on these arms here are rubber blankets.

Q And who put those rubber blankets on this phase that day, if you know? A I don't know.

Q Were they there when Luther was taken down from the pole? A I couldn't say.

Q You made no observation about that? A No, sir.

Q Did you finish up the work on the pole that afternoon? A I did.

MR. GLICK: Your witness, Mr. Gingher.

MR. GINGHER: We have no cross-examination.

THE COURT: That is all.

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[Page 215, line 5 - Page 221, line 12]

MR. JAMES FREDERICK LONG, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GLICK:

Q Mr. Long, will you tell us your full name? A James Frederick Long.

Q Where do you live? A 544 Hall Avenue, in Findlay.

Q Did you, in June of 1955, live at 43 Superior Court, in Lima? A That's correct.

Q Now, in June of 1952, were you employed? A I was.

Q By whom were you employed? A By the Ohio Power Company.

Q And in what capacity were you employed? A As a distribution engineer.

Q Now, at that time was the Ohio Power Company engaged in doing some work at Hicksville? A That's correct.

Q And can you briefly tell us what the [216] nature of the work was that was being done by Ohio Power Company there? A The work was of a nature to enable the change in voltage from what is called the 2300-volt delta system to a 4000-volt wye system.

Q And the wye system, electrically speaking, doesn't have a neutral phase? A The wye system does have.

Q It does have a neutral phase? A Yes.

Q How many wires are used in a phase under the wye system and how many of them are neutrals? A There is one

neutral. Now, the number of wires would be dependent on whether we are speaking of 3-phase wye system or single phase of a wye system.

Q What kind was being installed? A It would have been a 3-phase wye system from the substation.

Q Now, to your knowledge there were certain materials that were being furnished in the work that was being done at Hicksville; is that correct? A That's correct.

Q And this material was furnished by whom?

A Furnished by the Ohio Power Company.

Q All of it was? [217] A That's right.

Q That would include the poles? A Right.

Q The arms? A Right.

Q Clamps? A That's correct.

Q Wire? A Right.

Q Anything that was attached to the poles and part of the system; isn't that so? A To become a permanent part of the system, that's right.

MR. GINGHER: Will you speak up a little, Mr. Long?

Q Now, the Ohio Power Company, in June of 1952 and prior to that time and up until the present time, is what is commonly known as a public utility, is it not? A It is.

Q And it functions in the State of Ohio? A It does.

Q And on all the poles that were existing on June 25th, in the Hicksville area, was there energized wires, that you know of?

A You are asking me if on all the poles [218] without exception, were there?

Q I will withdraw the question momentarily. On the second

pole from the substation, one of the new poles, were there energized wires that day? A There were.

Q And functioning as part of the utilities service which the Ohio Power Company was licensed to do? A That's correct.

Q And the Ohio Power Company owned the pole? A That is correct.

Q And everything that was on the pole? A Every permanent part of the pole.

Q The number two pole from the substation was a new pole? A That's correct.

Q And the crossarms that had been erected on it, were they new? A They were new.

Q And is there a substance that is put on those crossarms? A There is.

Q Can you tell us what that substance is? A In this case it is creosote.

Q And there was creosote on those arms? [219] A That's correct.

Q And what is the purpose of putting creosote on crossarms, Mr. Long? Do you know that? A The purpose of creosote is to protect the arm.

Q From what? A To protect the arm from rot, as well as a number of other things. I am no expert on creosote.

Q You do know essentially what the function of creosote is on a crossarm? A I do, yes.

Q And from the viewpoint of yourself as an engineer for the Ohio Power Company, the creosote is used as a preservative of the wood; isn't that so? A That's correct.

Q And with that thought basically in mind? A Right.

Q By the way, do you remember what the temperature was at Hicksville on that day? A No, sir, I don't know the temperature.

Q Well, can you tell us from your own judgment whether it was a hot or a cool day? A It was a warm day.

Q A warm day? A Yes, sir.

[220] Q And was the air cloudy in any way? A I have a vague recollection of having rain, a light rain that morning. That afternoon, no rain. I recall no clouds.

Q Is that a recollection, or is that a mere guess?

MR. GINGHER: I object. He answered it. Let us not impeach his own witness here.

MR. GLICK: I am not trying to impeach him. I am trying to make him look good.

THE COURT: Never mind the comment. This is direct examination, you keep that in mind. I believe the witness said his recollection was it rained.

Q Was it a heavy rain? A No, sir.

Q How long did it last? A I don't remember.

Q What time of day did it rain? A It was in the morning, I think about ten o'clock.

Q Can't you tell us when it stopped? A No, sir. I didn't keep a diary on the weather that particular day.

Q Now you started working for the Ohio Power Company when? [221] A December 1, 1948.

Q And that is the only company you have ever worked for? A No, sir, that is not the only company I've ever worked for.

Q In line with your electrical experience?

A That's correct.

Q I didn't mean to imply you didn't work otherwise. Any practical experience that you have gotten in the electrical line was as an employe of the Ohio Power Company; isn't that so?

A Yes, sir, that is so.

* * *

[Page 223, line 12 - Page 248, line 24]

Q Mr. Long, I believe the last question that was asked of you yesterday, and which you answered, was the fact that the only practical experience along electrical lines that you had was with this defendant company, Ohio Power Company, and your answer was yes?

A That's correct.

Q And when was it that you started work for the Ohio Power Company? A On December 1, 1948.

Q Was that under the classification of engineer?

A That's correct.

Q Electrical engineer? A Engineer of distribution.

[224] Q Dealing with electricity; isn't that so? A Yes, sir.

Q Now, Mr. Long, you have a college degree from an accredited college or university, in the field of engineering, do you not? A Yes, sir.

Q And you did have such prior to the entry of your employment with the Ohio Power Company? A Yes, sir.

Q And what is the nature of the scholastic degree that you hold? A Bachelor of Science in Engineering.

Q In Engineering? A Yes, sir.

Q And that would require, in order for you to qualify for

such, a four-year course in a college or university? A Yes, sir.

Q That would be the minimum requirement? A I believe so; yes, sir.

Q And you do hold such a degree? A Yes, sir.

Q Now, in the course of your studies in advancement to that degree, you were obliged to study a certain number of sciences; isn't that so? [225] A Yes, sir.

Q And the fact that you hold a Bachelor of Science degree in electrical engineering is indicative of the fact that you did, in fact, study such sciences, and satisfied the scholastic authorities that you were proficient in that; isn't that so? In other words, you passed your marks?

THE COURT: Wouldn't we assume if he got a degree that they considered him qualified for it at whatever college it was?

MR. GLICK: All right, sir.

Q Now, among the courses of study that you had in your educational program was chemistry; isn't that true? A Yes, sir.

Q And in the course of studying chemistry, you deal with the properties of various substances; isn't that true? A Yes, sir.

Q And the effects of heat and cold on various properties? A Various chemical compounds, yes, sir.

Q Do you know what creosote is? A Not thoroughly, no, sir.

Q Well, do you have any idea of what it is?

[226] A Other than to say it is a wood preservative, no, sir.

Q Do you know that it is an oil? A Yes, sir.

Q And do you know the properties of oil? A To say yes, inclusive, I couldn't do. I know some of the properties of oil, yes, sir.

Q Do you know the effect of heat on oil? A Yes, sir.

Q And you were aware of that prior to June 25, 1952? A Yes, sir.

Q Incidentally, Mr. Long, besides yourself, there are more engineers employed by the Ohio Power Company? A Yes, sir.

Q And do you know whether they also are the owners of college degrees? A I don't know all of the engineers in the Ohio Power Company, so I couldn't answer that question.

Q Well, the ones that you do know, do you know whether they are college-trained men? A I can think of none who hasn't.

Q I didn't quite get that. A I say, I can think of none in the Ohio [227] Power Company who hasn't had a college degree.

Q Now, as I understand the situation, Mr. Long, and you may correct me if I am wrong, you were on the site where this work was being performed by the men of Hoosier, you were on the site at Hicksville where this work was going on? A I was in and around Hicksville for a period of approximately one month.

Q And you were there while the work was going on? A I was in and around Hicksville while the work was going on.

THE COURT: Speak a little louder.

Q Weren't you also on the site where the work was going on? A At what particular time, sir?

Q While the work was going on?

MR. GINGHER: I object, and ask he be specific about the time.

THE COURT: I don't think it is quite clear what you mean by "on the site" and when to be more specific.

Q At Hicksville, the Ohio Power Company has what is known as a substation; isn't that so? A That's so.

[228] Q And from the substation certain electrical energized lines ran off onto poles; isn't that correct? A Yes, sir.

Q And progressively the lines ran from one pole on to the next? A Yes, sir.

Q And is that part of your utility system; isn't that so? A Yes, sir.

Q And you were, in effect, and in fact, functioning as such on June 25, 1952, transmitting electricity?

MR. GINGHER: Who was?

A The Ohio Power Company, sir?

Q Yes. A Yes, sir.

Q I don't mean you personally. Now, does that clarify for you what is meant by the site of this work? A You mean, I believe, at the substation site?

Q And the poles. A And the immediate vicinity.

Q And the area where the wire was being [229] strung? A Yes, sir.

Q That is what I mean. A Yes, sir, I understand.

Q And you were at that site from the time that the work commenced by the Hoosier crew, were you not? A At various times, yes, sir.

Q I don't mean you were there 24 hours a day, but you

were there? A Yes, sir.

Q And you were there on a daily basis while work was in progress? A Not necessarily, no, sir.

Q But a good deal of the time when work was in progress, you were in that vicinity? A No, sir.

Q Were you on the site? A No, sir.

Q Were you, on June 25, 1952--

MR. GINGHER: When? Before or after the accident?

Q On June 25, 1952, during the working day? A Yes, sir.

Q And, Mr. Long, when Mr. Creasy was involved in an accident on the pole, you didn't actually [230] see the accident, did you? A No, sir, I did not

Q But did you see Mr. Creasy at all when he was up the pole after the accident? A Yes, sir.

Q And what was it that you observed? A I observed he was hanging by his safety belt.

Q On the top of the pole, or some distance up the pole? A Some distance up the pole, yes, sir.

Q Did you observe anyone else on the pole besides Mr. Creasy? A I don't recall I saw anyone on the pole other than Mr Creasy.

Q Now, in addition to yourself, was there any other employe of the Ohio Power Company on the site of the work going on that day?

MR. ELAM: At any time?

Q (Continued) Any time? A I understand that there was.

Q Well, do you know or is that just a notion that you

obtained from discussion with someone? A When I arrived at the substation site, I recall seeing Glen Brush at that location.

[231] Q Now there is one question I would like to get clarified, Mr. Long. When you saw Mr. Creasy dangling on the pole, is that the work you used, or hanging? A I don't recall my wording, sir.

Q When you saw him hanging or dangling on the pole by his safety belt, can you tell us what time of the day it was?

A It was sometime in the afternoon.

Q Can you fix it a bit closer than that? A Sometime between one and three o'clock, would be about as close as I could come.

Q Now, what was the voltage that was being transmitted on the lines and particularly on the number two pole on June 25, 1952, if you know? A It was a 2300-volt delta system.

Q And there was that much voltage being transmitted?

A I would hardly call it transmission of voltage, but, yes, sir.

Q Would you prefer to use the word energized?

A Yes, sir.

Q Well, the lines were energized up to that degree of voltage? A Yes, sir.

[232] Q Now 2300 volts of electricity, is that considered dangerous to human life and limb by contact? A Yes, sir.

MR. GLICK: No further questions of the witness at this time.

CROSS-EXAMINATION BY MR. GINGHER:

Q Now, Mr. Long, on direct examination yesterday, I believe you stated that those poles were new? A Yes, sir.

Q Now, what did you mean by that? A They had never been used before.

Q Were you attempting to state how long they had been poles, or how long they had been in stock?

MR. GLICK: Just a moment, if your Honor please. I object to what he was attempting to do. We are dealing with what he has stated.

THE COURT: I will overrule the objection.

Q Were you attempting to give the length of time since they had been processed as poles? A No, sir.

Q Where did they come from, if you know? A I don't know definitely where those poles had come from.

Q Do you know where the crossarms had come [233] from? A No, sir.

Q You don't. How did they get to the site? A I believe in this instance Mr. Brush delivered them to the foreman on the site.

Q Now I would like to have you describe the operation in Hicksville. Was there anything beside the substation in Hicksville? A Well, many lines emanating from the substation.

Q And where was this substation located, in the heart of Hicksville, or near it, or where? A No. It was in the northeastern direction.

Q And did the Ohio Power Company have any other property or office in Hicksville? A There was an office in Hicksville, yes, sir.

Q And was that right at the substation or some distance from it? A That was some distance from the substation.

Q Now, had you been at the substation or at the site of the work where Mr. Creasy was injured prior to the time that he was injured that day? A No, sir.

Q What had you been doing that day? [234] A The major portion of my work there was to trace a neutral, a neutral conductor to make certain that it was a continuous metallic neutral all the way where we had our primary lines and on that particular morning, I had been in a rural section of Hicksville doing just that.

Q Now, where were you at the time you learned, if you did, of the accident? A I was in the office in Hicksville.

Q And how did you receive word? A The word was received in that the lights in the office building went out.

Q And did that mean something to you? A It meant to me a case of trouble someplace.

Q What did you then do? A I went out to the car,. got into the car and drove to the substation.

Q Now, I believe you were asked concerning creosote. Were the poles and crossarms creosoted? A Yes, sir.

Q That the Ohio Power Company used? A Yes, sir.

Q Had creosoted poles been in used by the company during all of the time that you have been employed [235] by it?

A That is correct, yes, sir.

Q Now, in your travels around the state or in the territory on behalf of the Ohio Power Company, do you have an opportunity to observe the type of material used by other power companies?

A Yes, sir.

Q And will you tell the jury whether or not other power companies engaged in similar business as the Ohio Power Company,

employ the use of creosoted poles and crossarms? A I know of no company that does not use them, in all the travels I have made. I have noticed, as I think most distribution engineers do, the lines of other companies, and those that I have observed do use creosote.

Q Now, did the Ohio Power Company do any creosoting itself A No, sir.

Q Do you know how the poles and crossarms were obtained? A They would have been obtained on a purchase order.

MR. GLICK: If your Honor please, I object and move the answer be stricken, because the answer says [236] "they would have been".

THE COURT: Well, do you know how they were obtained?

THE WITNESS: Not directly, no, sir.

Q Now, these crossarms that were used on this particular job, you saw them, didn't you? A I must have seen them; yes, sir

Q Did you see them sufficiently to tell the jury whether or not they were the standard type of crossarms?

MR. GLICK: I object, unless he qualifies himself for that purpose.

THE COURT: Ascertain if he knows.

Q What is the standard type?

MR. GLICK: Now, if your Honor please, unless he first can qualify to say that.

MR. GINGHER: He is qualified as an engineer and having been employed and having worked with this.

THE COURT: Ask him if he knows the standard.

Q Do you know the standard type of crossarm? A Yes,

sir.

Q Will you describe this crossarm? A It was the normal 6-pin crossarm, 8 feet in length.

[237] Q Did it conform to the standard used by your company and other companies? A Yes, sir.

Q Was it different in any respect? A No, sir.

Q Now, what were your general duties on the job and in relation to this particular work that was going on near Hicksville?

A The principal duty I had was the making sure, certain that that neutral was continuous. With respect to this particular job, my work was to set up the job as it would finally appear.

Q Will you be a little more explicit about that?

A Well, we make what we call work sheets showing those particular items that will, upon the completion of the job, be on any given pole. Now, in our company, we number each and every pole, and these work sheets would show a pole number and the work sheet is divided into three columns, what we call a "Company Column" on the left-hand side, the "Maintenance" in the middle and "Retirement" on the right-hand side. The Company Column would show a pole of whatever height and class was necessary to get the job done. It would also show as many arms as would be required in the final analysis on [238] this pole and any other material of a permanent nature to be on this pole.

The Maintenance Column would show the transferable of any existing conductors to a pole and the Retirement Column will show if there is a replacement of a given pole, if any arms are to be repaired or any conductor is to come down.

Q Now, was it your job to see that the final result of the

work that was ordered by the Hoosier Company to be done was, as a matter of fact, completed in accordance with the specifications?

A Yes, sir.

Q Now, if you contacted anyone on these working crews, if you did so, had occasion to, with whom would you make your contact? A My contact normally would be with the superintendent.

Q In the absence of the superintendent? A In the absence of the superintendent, it would be the foreman of the crew.

Q Did you ever contact anyone on the job other than those two individuals, in connection with the work being done or to be done?

A No, sir.

Q Now, Mr. Long, did you have any contact [239] with the plaintiff in this case, Mr. Luther Creasy, on that job, in so far as the work was concerned? A No, sir.

Q Did you give him any instructions of any kind in connection with the work that he did? A No, sir.

MR. GLICK: If your Honor please, I object. I submit it is leading and not proper cross-examination in view of the interrogation on direct examination.

MR. GINGHER: I am cross-examining in connection with testimony that he himself produced through another witness.

MR. GLICK: Notwithstanding that, if it is a matter of defense, the time to put it in is on the defense. This is merely cross-examination of a witness called by the plaintiff.

THE COURT: The rule will be that the cross-examination will be limited to what he testified to on direct.

MR. GINGHER: Very well.

Q Now, you were asked concerning the energizing of these

lines. What arrangement was there in the event there was a contact with the line? What would happen to the power under the arrangement as it was prior to the time that Mr. Creasy was injured?

[240] A Assuming that the fault current were great enough, there would be an operation of the breaker in the substation.

Q What kind of a --

MR. GLICK: Just a minute, if your Honor please. I am asking that answer be stricken on the ground it is not responsive and assumes certain things which are not incorporated in the question.

THE COURT: I will overrule the objection.

MR. GINGHER: Read the last part of the answer.

(Thereupon the last answer was read by the reporter.)

Q Will you explain a little more what you mean by the operation in the substation?

MR. GLICK: If your Honor please, I don't want to be disruptive. I am obliged to object because you have already rules that cross-examination is limited to what is contained in direct examination.

THE COURT: Well, you asked about the voltage and the energizing of the line. I think this would come within proper limits.

MR. GINGHER: Do you remember the question?

THE WITNESS: Repeat that, please.

MR. GINGHER: Will the reporter please read it?

(Thereupon the last question was read by the reporter.)

[241] A The breaker inside of the substation was a G.E. type flo breaker. It had only a lockout mechanism. The reclosing mechanism

had never been installed. Therefore, had the fault current been great enough, there would have been one operation and no restoration of service.

Q Well, I can understand that you have this Bachelor of Science degree now, alright. But for us folks who don't understand it, will you explain in layman's language what the effect is in the event contact is made with the wire. What happens? A The current through that wire is increased.

Q You say it is increased if there is contact with it? A That is correct; yes, sir.

Q Is that an automatic reaction that comes in any event? A In any event of a fault, yes, sir.

Q What do you mean by "fault"? A A short circuit.

Q A short circuit? A Yes, sir.

Q Contact is a short circuit? A Yes, sir.

Q Now then what happens? [242] A The current has increased, that is the first thing. Secondly, this reclosure or this -- excuse me -- breaker inside of the substation has a setting for a current, that current depending upon the amount of load that is carried out of that substation. Now should the current through the conductors from the substation exceed that value, there will be an instantaneous trip, depending upon how far it is from the set value.

Q If it goes to that point, then it drops off? A That's correct.

Q What does that mean when it drops off? A That means the lines are de-energized.

Q The lines are de-energized? A That's right.

Q The lines aren't hot, as we have said? A No, sir,

they are not hot.

Q Was there anything in the substation, in the event that happened, to cause the line to be automatically re-energized? A No, sir.

Q Now, is there such an arrangement whereby it may be re-energized under those circumstances? A In some substations, yes, sir.

Q But was there any such in that substation [243] on that day? A No, sir.

Q How is it energized again? If it shuts off, how would it be re-energized under the type of system that was in use on that day? A The only way it could be re-energized would be for a man to go to that substation and manually close the breaker.

MR. GINGHER: That is all.

REDIRECT EXAMINATION BY MR. GLICK:

Q Mr. Long, this breaker in the substation that you are talking about, you say that was a G.E. type? A Yes, sir.

Q And did you actually see this breaker? A Yes, sir.

Q And when did you see this breaker? A I know that I can tell you when I saw it.

Q Well, did you see it prior to the accident? A Yes, Sir.

Q Now, how many of these breakers do you have in a substation? A That depends upon the substation and the loads involved.

[244] Q We are talking about the one at Hicksville. A There was only the one breaker.

Q And you have just one slot that that breaker falls into,

that is, the copper arm? I will withdraw the pending question. You have, what you mean by a breaker is a sort of jackknife arrangement with a handle on it; isn't that right? A Not necessarily, no, sir

Q Well, assuming that it was a single-unit breaker, the bottom of the breaker is fastened onto a hinge; isn't it? A The breaker is enclosed in oil. It would be impossible for me to see that

Q The functioning part, in order that it may move up and down, is hinged; isn't it? A Yes, sir.

Q Then you have a copper bar; is that right? A I can't tell you the metal from which it is made.

Q A metal bar? A Yes, sir.

Q And that bar runs up a certain distance depending upon the size of the breaker, does it not? A Yes, sir.

Q And then you have a bar running [245] horizontally to that particular bar. In other words, it would be parallel with the hinge on the bottom, wouldn't it? A I don't know that I can state that, no, sir.

Q Well, where would you grasp it to operate it manually? A I have never operated one manually. I can't tell you.

Q Can't you tell us from observing it? A I have never observed the closing of the breaker.

Q Can't you even tell us the physical nature of this breaker you have been telling us about? A I can tell you only this, your contacts are opened in oil in order to quench any arc that may result from the fault current.

Q Well, Mr. Long, that is very interesting. What I am concerned about, for the moment however, is the method of manual

operation of this breaker. Now, you have told us that it operates manually? A Yes, sir.

Q You have never seen it? A Yes, sir, I have seen it.

Q And you, as an electrical engineer, can't [246] tell us what one of those manual operators -- what one of those look like? A I can't tell you exactly.

Q Just tell us from your experience as an electrical engineer, if, in fact, it does not have a metal bar across the top on which then comes a handle where you grab it to push it back and forth? A There is a hinge, there is a handle.

Q The hinge is down at the bottom bathed in oil, isn't it? A Yes, sir.

Q And are you sure you know how this breaker functions? A Yes, sir.

Q And on what basis do you know about this particular breaker?

MR. GINGHER: Well, now, if your Honor pleases, he seems to be cross-examining his own witness.

THE COURT: Yes. This is direct examination.

MR. GLICK: Well, this is not matter which was established on direct testimony, Judge. I objected to Mr. Gingher's going into this.

THE COURT: It is still your witness and it was proper cross-examination, as I ruled.

MR. GLICK: Will your Honor judicially notice [247] that this man is a witness for the defendant and in its employ.

THE COURT: I take notice of that, as well as the fact

that you called him. I think the witness will answer any question you ask him if you will proceed.

Q Did you actually operate or observe this breaker in operation? A No, sir.

Q Now, how do you know that this was an automatic kick-out breaker? A It is a G.E. type flo breaker, which is what that is

Q And that is the basis for your knowledge of it? A Yes, sir.

Q Now, if it is an automatic kick-out, can you tell us why it must be operated manually? A Because there was no reclosing portion to the breaker.

Q You mean it was automatic only to the point of kicking out? A Yes, sir.

Q And how much of a disturbance must you have on the line in order for it to kick out? A You are asking a question, the answer to [248] which would vary under varying conditions. Our load in Hicksville substation at that particular time was on the order of 1800 k.v.a., which would be in the order of 450 amperes.

Q You have stated, in questioning by Mr. Gingher, that if there was a contact on the line, that the load would be increased. A That the current would be increased, yes, sir.

Q That the current would be increased? A Yes, sir; that is correct.

Q And for how long a period would that current be increased? A As long as the fault existed and the load on the lines remained constant.

Q So energy would be flowing through those lines?

A Yes, sir.

Q And that energy would continue as long as the fault existed? A Yes, sir, unless that fault was sufficient to take the breaker out of service.

MR. GLICK: Thank you, sir.

MR. GINGHER: That is all.

* * *

[Page 268, lines 4 - 9]

MR. HOWARD S. KENNY, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GLICK:

Q Will you state your name, sir? A Howard S. Kenny.

* * *

[Page 268, line 14 - Page 274, line 21]

Q By whom are you employed? A U. S. Weather Bureau.

Q And do you have with you the records of the Weather Bureau as of 1952? A Yes, sir, I do.

Q And particularly for the month of June?

A For Van Wert, Ohio, in June.

Q Do you have the records for the date of June 25, 1952?

A Yes, I do.

Q Now, do you have a weather station at Van Wert, Ohio?

[269] A Yes.

Q And is that in the proximity of Hicksville, Ohio?

A I am not acquainted with Hicksville, I am sorry.

Q Do you know if it is in proximity to Hicksville?

MR. GINGHER: Object. He just said he wasn't

acquainted with it.

MR. GLICK: Will you concede it is in proximity to Hicksville?

MR. GINGHER: I don't know, either.

Q You don't know whether it is or not, Mr. Kenny? A No, sir.

Q Do you have the readings of your weather station on June 25, 1952? A Yes, sir.

Q And what was the high temperature that day? A 95.

Q And can you tell us, Mr. Kenny, are the temperatures which are taken and registered and used by the Weather Bureau taken out in the sun, or are they taken in the shade? [270] A In the shade.

Q And in your experience and knowledge with the Weather Bureau, do you know whether there would be a variance between temperatures in the sun and those registered officially as taken in the shade? A That depends whether you mean air temperature or temperature registered officially. The air temperature presumably is no different.

Q And how about the temperature of a body exposed in the sun? A Yes, that would be higher.

Q That would be hotter than the official registered temperature? A That would be hotter than the air temperature.

Q And hotter than the air temperature itself? A Yes.

Q Now, Mr. Kenny, from your experience with the Weather Bureau, is a record temperature of 95 degrees considered to be unusual in Ohio during the latter part of the month of June?

MR. GINGHER: Object.

THE COURT: I will sustain the objection.

MR. GLICK: If your Honor please, I should like to indicate for the record that what we are seeking [271] to illustrate and prove is, that the temperature that was recorded on this particular day was not an unusual one, that it is a situation that may be anticipated so that the element of foreseeability is available in the case.

THE COURT: Well, I suppose the best way to have proved that would have been to have had him bring in his records in and around the 25th of other years.

Q Have you had in other years recorded temperatures at 95 degrees in the latter part of June?

MR. GINGHER: Object.

THE COURT: If he remembers, if he knows.

A Yes, in the latter part of June.

Q Have you had them higher than 95? A I don't know where the dividing line is, somewhere in that vicinity.

Q You have had, on previous occasions, temperatures of that degree? A Yes.

Q And that was prior to 1952? A Yes.

MR. GLICK: I have no further questions, Mr. Kenny.

[272] CROSS-EXAMINATION BY MR. GINGHER:

Q Do you have the temperature for days preceding June 25th at Van Wert? A Yes, I do.

Q Were there any other warm days prior to that time?

A Yes, there were.

Q What was the 24th?

MR. GLICK: Now just a moment. What area are you

referring to?

MR. GINGHER: The area he has been testifying about.

MR. GLICK: Well, we were talking about Van Wert.

MR. GINGHER: That is what I said in my question.

MR. GLICK: I just didn't want you off in some different area; like to keep you in Van Wert temporarily.

MR. GINGHER: No, I am going to stay right close.

A On the 24th, the high temperature was 93.

Q For the 23rd? A That also was 93.

[273] Q Let's go on back, see how it ran the day before that?

A 22nd was 79.

Q You had two days prior to the 25th in which the temperature was approximately the same, 93 and 95? A That's right.

Q Is that correct? A Two days were 93, prior to that.

Q Two days were 93 and on that day it was 95. What hour of the day did you take that high reading? A There are no times fixed in this type of record. It is simply the highest temperature recorded in the 24-hour period, from 6:30 one day to 6:30 the next day.

Q That could have been 4:30 or at some other time, right at noon? A It could have.

Q What was the range on the 25th, of temperature?

A The lowest recorded was 74.

Q And the highest 95? A 95.

MR. GINGHER: That's all.

[274] REDIRECT EXAMINATION BY MR. GLICK:

Q Mr. Kenny, the high record could also have been registered between one and two o'clock, could it not? A Yes, sir.

Q That would be in the afternoon? A Yes, sir.

Q Now, usually, what is your peak point for the high temperature, what hour? A It varies from one day to the next, from one o'clock in the afternoon until five in the afternoon.

Q The peak heat would be reached in between those hours? A Mid-afternoon.

MR. GLICK: Thank you, Mr. Kenny.

And thereupon

MR. JOHN H. SHAW, being duly sworn,

testified as follows:

DIRECT EXAMINATION BY MR. GLICK:

* * *

[Page 275, line 1 - Page 276, line 11]

Q Will you state your name, sir? A My name is John H. Shaw.

Q And how do you spell that last name? A S-h-a-w (spells).

Q And where do you live? A In Columbus. Do you want the address?

Q If you care to state it. A Melrose avenue, 576.

Q And what do you do, sir, as a vocation, avocation or profession? A I am assistant professor in the Department of Physics and Astronomy at the Ohio State University.

Q Are you a meteorologist? A No. I would prefer to call myself an atmospheric physicist. I am not a meteorologist in the sense I forecast what the weather is going to be. I am more interested in the properties of the atmosphere.

Q In other words, you are a physicist, is that basically the

background? A Yes.

Q And training that you have got? A Yes.

Q Dealing with atmospheric conditions or atmospheric reactions? A Yes, I would call it that.

[276] Q And atmospheric effects? A Yes.

Q And you say that you are an assistant professor at Ohio State University? A Yes.

Q And where did you obtain your degree, Mr. Shaw?

A At Cambridge University, England.

Q And how long have you been occupied in the particular field which you have told us about? A About nine or ten years now

* * *

[Page 278, line 19 - Page 279, line 20]

Q Supposing that you have a recorded temperature by the United States Weather Bureau at 95 degrees which, it is testified to, is taken in the shade. A Yes.

Q Now, at that particular point, if you had a sunny day with no visible clouds in the area, would there be a variance between that temperature as recorded [279] taken in the shade and the temperature taken out in the sun in an area that is not clouded?

A Again, I would like to state the answer in my own words. The Weather Bureau is interested in measuring the temperature of the atmosphere. That is the purpose for making the measurements in the shade. The Weather Bureau makes measurements with thermometers in a very carefully exposed position in order to record the true temperature of the atmosphere. Now, I think that your question is if when the sun is shining on a solid object such as the surface of the

earth, would the surface of the earth or other object be different from the temperature of the atmosphere as measured by the Weather Bureau.

Q You have understood me beautifully. A And I think if the sun has been shining, that very definitely any solid object which is exposed to the sun's rays will be at a higher temperature than the measurements recorded by the Weather Bureau of the air temperature in their standard enclosure.

* * *

[Page 300, line 3 - Page 353, line 21]

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

And thereupon

MR. DANA J. DEMOREST, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GLICK:

Q Is that D-e-m-o-r-e-s-t? A Yes, sir.

Q What is your full name, sir? A Dana J. Demorest.

Q And can you tell us where you live? A I live 4001 Westerville road, Columbus.

Q Are you associated with Ohio State University?

A I was professor of metallurgy for 44 years, until I reached the age of 70 and then retired 4 years ago.

Q You are now then a retired professor? A That's right.

Q Do you have any degrees in the field of science or engineering? [301] A Yes, I have.

Q And what degrees do you have, sir? A Chemical engineer.

Q And what experience have you had besides the obtaining of your degree in chemical engineering? A Well, I was for a while the fuel chemist for the Ohio Geological Survey, also fuel chemist for the United States Bureau of Mines at Pittsburgh, gas chemist for the United States Steel Corporation, at Gary, Indiana; chemist for the State Board of Agriculture here in Ohio. I was commanding officer of the toxic gas plant at Edgewood Arsenal during World War I; that plant was designed, built and operated under my command. During a good share of those 44 years, while I was teaching, I handled courses in fuels and combustion plus other courses.

Q Now, Professor, are you familiar with creosote and the properties of it? A Yes, I am.

Q And can you tell this Court and jury what creosote is? A Creosote is a distillate obtained by distilling coal tar. The distillate which is taken off between two specified temperatures, say, 210 degrees Centigrade and 250 degrees Centigrade and makes up the creosote oil.

[302] Q In other words, creosote is an oil which is derived from a distilling process or distillate process of coal or coke? A Coal tar and the coal tar in turn comes from the distillation of coal in a coke oven.

Q And it is an oil? A It is an oil, yes, sir.

Q I show you a bottle containing a black liquid substance and ask you if you can identify what that substance is? A I think I can, but I am not too sure. My olfactory nerve has been paralyzed since World War I.

Q Can you recognize it from your experience? A It looks like creosote oil.

MR. GLICK: Would you like a sniff of this, Mr. Gingher?

MR. GINGHER: No.

MR. GLICK: I should like to have this marked in evidence as Plaintiff's Exhibit 8.

[Thereupon a bottle of creosote was marked for identification as Plaintiff's Exhibit No. 8.]

Q Now, Professor, do you know the properties of creosote and the reactions of it to heat? A Oh, yes.

Q Now, you have told us that creosote is [303] essentially an oil? A That's right.

Q And are you familiar with the characteristics and reaction of oil to heat? A Yes. Of course, heat is a very indefinite term. That depends upon how much heat you put into it, what temperature you bring it to. Creosote is a very, very complex oil, made up of scores of different chemical compounds, chiefly naphthylene and anthracene and their derivatives, and oxalate compounds, such as phenol. That is the same as carbolic acid. Oxalate is the same thing except higher molecular weight, so are the zylonels. They are all similar to carbolic acid.

Q Did you also mention toluyl? A Shouldn't be any toluyl in this.

Q Now, the product creosote, is that a slippery substance? A Yes, it is slippery. It is like all oils. It is unctuous.

Q And when creosote is exposed, let's assume to the heat generated by the rays of the sun, what happens to it? A It

becomes warm like anything else the sun's rays fall upon, up to whatever temperature the sun [304] is able to heat it to.

Q And when that happens, does its property of slipperiness increase or decrease? A Like all substances, it becomes less viscuous, more fluid and with a higher increase tendency to move by capillary action in whatever it is absorbed in.

Q Meaning that it becomes more slippery?

MR. GINGHER: I object. Let's let the witness testify, please.

A I would say it becomes more slippery. I would say it becomes more available.

Q Just what do you mean by "available", Mr. Demorest?

A What I mean, it comes to the surface where it can be slippery. Of course, if it is on the interior of something, it is not slippery, it is fixed.

Q But on the surface, in view of those circumstances, it would be, using your own words, what? A Available for slipperiness.

Q And assume that the creosote was imbedded in wood, can you tell us what the effect of heat from the sun, that is, exposure, has on wood that is treated with creosote?

MR. GINGHER: Now, if your Honor please, I should like to object, unless it is clearly understood [305] that he is speaking very generally and hypothetically and not with reference to any situation that is before this Court. I think it is preliminary, if that is what he intends it to be.

THE COURT: I take it that is the nature of the question.

MR. GLICK: Do you understand the question?

THE WITNESS: I have forgotten it now.

MR. GLICK: Could we have the question repeated?

(Thereupon the last question was read by the reporter.)

A Heat and sun, of course, raise the temperature of the whole mass including the wood and creosote, which has been absorbed in it, resulting in the decrease in the viscosity of the creosote, increasing its ability to move because of the lower viscosity, increased tendency to move due to capillary attraction.

Q And would the tendency be for it to rise to the surface of the wood that is exposed?

MR. GINGHER: I object. I think he ought to ask the witness.

THE COURT: Ask the witness what the tendency would be instead of stating it.

Q Do you know what its tendency would be with regard to rising to the surface of the wood that is [306] exposed to the sun? A Well, that would be dependent, of course, upon how thoroughly impregnated the wood was with the creosote. If it is very lightly impregnated, the chances of it coming to the surface to wet the surface would be less. If it is heavily impregnated, the tendency would be for it to come to the surface because of its increased mobility, because of the increase to a higher temperature.

Q Now, Mr. Demorest, do you have any experience and knowledge with regard to the treating of crossarms on utility poles with creosote? A Two or three words I didn't hear in the early part of your sentence.

MR. GLICK: Could we have the question?

(Thereupon the last question was read by the reporter.)

A Well, I know that telephone pole arms are treated with creosote That is a matter --

Q And is there a --

MR. GINGHER: He didn't finish.

A (Continued) That is a matter of common knowledge, that is in all the books and publications.

Q Do you know what the standard amount of creosote is that is used in treating those crossarms? A Well, it runs from six to twelve, and sometimes higher, pounds of creosote per cubic foot of wood.

[307] Q It is in the range of 6 to 12 pounds of creosote?

A That's right, per cubic foot of wood. Now, that is just the normal amount. Of course, it may be more than that, depending upon how high a vacuum the wood was subjected to before it was treated or how high a pressure or how long it is in the creosote. That depends upon the practice of the creosoting plant.

Q But the basic amount would run from 6 to 12 pounds per cubic foot? A That's right.

Q If you had a crossarm 8 feet long, 4 inches wide and 4 to 4-1/2 inches deep, could you compute out for us the number of cubic feet that are involved in that crossarm? A Well, 4 inches is a third of a foot; 1/3 times 1/3 is 1/9. If this arm is 8 feet long, you have, roughly, 8/9 of a cubic foot.

Q In other words, you have almost one cubic foot?

A Almost one cubic foot.

Q Do you have any experience with and knowledge of the temperatures of creosote on arms which are exposed in the sun?

A Of course, the creosote will come to the [308] temperature

of the arm, and the arm will be heated by the rays of the sun up to whatever temperature the sun can heat it, depending on the nature of the day. I have gotten temperatures of 140 degrees Fahrenheit in the sun, temperatures so hot if you picked up a piece of steel, it burns your hands, even blisters them.

Q And what was the Weather Bureau temperature on such a day? A Well, I would say it is in the upper 90s.

MR. GLICK: Your witness, Mr. Gingher.

MR. GINGHER: No cross-examination.

THE COURT: That is all.

THE WITNESS: Thank you.

MR. GLICK: Thank you, Professor. Can we have Mr. Creasy brought in?

And thereupon

MR. LUTHER J. CREASY, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GLICK:

Q Will you state your full name to the Court and jury? A Luther Jackson Creasy.

Q Where do you live, Mr. Creasy? A Shawsville, Virginia.

[309] Q And you are the plaintiff in this case? A I am, sir.

Q I would like for you to keep your voice up, Mr. Creasy, so that all these ladies and gentlemen can hear what you have to say. A All right, sir.

Q Now, on June 25, 1952, who were you working for? A The Hoosier Engineering.

Q And what was the nature of your work? A Lineman.

Q And where were you working? A Hicksville, Ohio.

Q How long had you been working at Hicksville, Ohio? A Approximately three weeks.

Q And what was the nature of the work that you were doing there? A It was a five-pole job distribution.

Q You say it was a five-pole job distribution? A Yes, sir.

Q What does that mean? A Well, take out the old poles and put new ones in, the five new ones to go in.

[310] Q Were you dealing with any electric wire? A Yes, sir.

Q Who was this work being done for? A For the Ohio Power.

Q Now, how many years had you been an electric lineman? A Well, I started back in 1929, when I first started working on it.

Q And had you been engaged as such up until the time of the accident on June 25, 1952? A I had, sir.

Q Now, at the time this work was in progress, was there electricity being transmitted along the lines? A Yes, sir.

Q And you have had experience working under such conditions? A Yes.

Q Now, where had you been working in the morning of that day? A On kind of an angle from the line across the railroad. There was a railroad running through there and I was working the other side.

Q You were on the opposite side of the railroad? A That's right.

[311] Q What were you doing on the opposite side of the railroad? A Put a pole over there to get ready to go over on the railroad span.

Q And what sort of a day was it with regard to heat, Mr. Creasy? A What was the question?

Q What kind of day was it with regard to heat? A It was a very hot day.

Q And did you go out to lunch that day? A I did.

Q What time was your lunch period? A We usually take off from 12 to 12:30.

Q And then did you return to work? A I did.

Q And where did you return to work? A Returned back to the same job we left from.

Q Across the railroad? A Yes, sir.

Q Now, at some time during that day, did you get down off that pole? A I did.

Q And would you tell us why it was that you came down off the pole across the railroad tracks? [312] A The engineer for the Ohio Power, he came around and he asked me where my brother was. I told him I didn't know, he was down on the other side someplace. So he asked me how much spacement I gave him in the clamps I had used.

Q You had used where? A Across the track on the other pole. So I told him I gave him five inches. He told me he wanted me to go back over and give him six-inch clearances.

Q He wanted you to go back? A Across the railroad tracks, go up the pole and give him six-inch clearance.

Q Had you had some difficulty? Before I ask you that

question, who was this engineer? A He was from Lima, Ohio. I had seen him a few times.

Q Who did he work for? A Ohio Power.

Q Do you know his name? A Mr. Long, I think.

Q And what did you do as a result of what he told you? A I started to proceed to carry out his orders and as I went up this other pole, I got up and stepped onto the buck arm that was on the angle.

[313] Q Mr. Creasy, just answer my question. You proceeded to carry out his instructions? A Yes, sir.

MR. GINGHER: Now, if your Honor please, I move the last question and answer be stricken because it was a conclusion, the question was.

THE COURT: The statement of Mr. Glick may be stricken. You may read the last answer of the witness.

(Thereupon the last answer was read by the reporter.)

MR. GLICK: That is where the end of the question came from; it is his own statement

MR. GINGHER: That is the viciousness of it, the vice of it.

THE COURT: Do you want the rest of the answer read?

MR. GLICK: The point is that the question which succeeded, was actually the use of the witness' own words. It was not a matter of leading him.

THE COURT: Well, in the first place, you should not repeat the answer of the witness. You have the witness to give his testimony and when you do repeat it, you use the word different than what he used it. If you will ask the witness the

questions and let him answer without repeating his answer.

Q Mr. Creasy, will you tell the Court what [314] happened after the conversation with Mr. Long? A Well, a week before that I changed the wiring.

THE COURT: The question was, after you talked to Mr. Long, what did you do?

THE WITNESS: You mean on the same day?

THE COURT: Same day.

MR. GLICK: That same day.

A The same day, well, I went on to carry out his orders.

Q What we want to know is, what did you do in carrying it out? A Well, I crossed over the railroad track and I climbed this pole.

Q Now, Mr. Creasy, did you have all of the equipment that is required for you in climbing a pole? A I did.

Q And you may proceed and tell us what happened as you went up the pole. A Well, I seen Sonny Aldrich on this pole. I climbed up and took my safety belt off and I put it around the pole and hooked it into the D ring on my belt, and that lets you lay back some, kind of at an angle.

Q What was at an angle? A The safety belt that you use around the [315] pole is used for your safety to stand in.

Q I don't think I understand what you are talking about. You say the safety belt was at an angle?

THE COURT: No. I think he said he put the safety belt around the pole and anchored, -- meaning you anchored.

THE WITNESS: At an angle

MR. GLICK: That is what I thought he said.

THE COURT: All right.

Q Now, Luther, you have to keep your voice up. I am standing close and I can just about hear you. You say you hooked in your safety belt? A Yes, sir.

Q Were you standing? A Standing on the buck arm.

Q And, Luther, I show you Plaintiff's Exhibit 7 and direct your attention to the fact that there are two poles in that photograph. Now, will you point with your finger in which direction the pole is that you are talking about, whether it be to the left or to the right of the photograph? Can you point with your finger? A To the left.

Q To the left? A Yes, sir.

Q Is that the pole where there is some [316] material hanging off some wires on the top of it? A It is.

Q Now you mentioned that you were standing on a buck arm? A Yes, sir.

Q Now what is a buck arm? A It is an arm put on, two of them together, carry off in another direction from the way the pole is facing.

Q Now, a buck arm, does that differ in any respect from the other types of arms on a pole, as far as the material is concerned? A No, it is no different.

Q Same material as the other arms? A Yes, sir.

Q And the reason you call it a buck arm instead of a cross-arm is why? A Because we have two of them together bucking one another.

Q And they run off in an opposite direction? A That's right.

Q From the crossarms? A That's right.

Q Now, where were you to work on that pole in changing clamps? [317] A I was to work over from this point.

Q "This point" is meaningless to this jury. What point are you talking about? A That is a point from the top where the arm is. They are two feet apart. The buck arms has steel braces running down. There was no place to stick into the pole and I had to stand on it somewhere.

Q Now, were -- where was this wire that you were to change the clamps on? A It was hooked on to the arm.

Q Sir? A It was dead end on the arm.

Q Which arm was it hooked on to? A It was hooked on to the buck arm, next to the top arm.

Q Would that be above the arm you were standing on? A Yes, sir.

Q Is this the arm in question? A That's right.

Q With the material hanging over the wires? A Yes.

Q Now, Luther, when you got up on the buck arm, what did you do? A I put my safety belt around hooked it [318] into the D ring on my belt, then when I reached around for my rubber goods which I carry in a canvas bag on my belt, on my right hand side, --

Q Would you stop there for a moment? I show you an exhibit marked Defendant's Exhibit F for identification, and ask you if you recognize what this is? A Yes, sir; I do.

Q What is it? A It is a canvas bag to carry safety equipment in, such as rubber gloves, the sleeves. That hooks right onto your belt that you wear around you.

Q And did you have such equipment with you? A I did.

Q And did you have it on you when you climbed the pole?

A I did.

Q And tell us what happened as you reached-- A Well, as I reached, I just felt my feet go out and I don't remember any more.

Q You reached -- A To get my gloves out of the bag.

Q Now, why were you attempting to get your gloves out?

A In order to remove the rubber goods, to get my wrench to loosen the clamp and remove it.

[319] Q And is that the first step that you take when you are dealing with energized wire? A That's right.

MR. GINGHER: Object.

A (Continued) -- And--

MR. GINGHER: Just a minute. First step he takes -- we want to know what he did on this occasion.

THE COURT: Let the answer remain. The question was leading. Let the witness testify. You ask the questions.

Q Luther, in order to undertake to do what you went up that pole for, would you tell us every one of the steps that it is necessary for you to take in order to do that work? You understand it?

A Yes, sir Well, I just make sure I had my safety case with me, those rubber gloves and sleeves, sleeves that go up on the arm and then your rubber gloves and you cover over. Those rubber goods had already been on this arm on this wire. So as I climbed up and saftied on, I reached for my rubber goods that was hanging on my belt to get my sleeves out to get them on and my rubber gloves. That is when my foot shot out from under me. I felt my feet fly out

and I don't remember anything else.

MR. GLICK: May I ask the Court to indulge [320] me for a moment? (Confers with co-counsel.)

Q Now, Luther, after this incident which you have related to us, what was the next thing that you recall? A I was at the White Cross hospital.

Q Where would that be? A It was here at Columbus, on Park street.

Q Do you know when it was that you became aware of where you were? A Somewhere up in July. I know the nurses was standing over me and doctors with white coats.

Q And do you have any recollection of anything that developed in between the time when you felt your feet going out and your recollection of being in White Cross hospital? A No, sir.

Q How old are you, Luther? A I am 41.

Q And when were you born? A In 1914.

Q What month? A 17th of November, 1914.

Q Now, how much schooling have you had, formal schooling, that is? A I went to about the seventh grade.

[321] Q And do you have any training other than the training that you had as a lineman? A No, sir.

Q Do you recall how long you were confined in the White Cross hospital? A No, sir; I don't.

Q Well, do you know you were confined in a hospital in Hicksville? A No, sir.

Q After you were discharged from the White Cross hospital, where did you go? A I went to my home.

Q And did you subsequently enter another hospital?

A I did.

Q What hospital was that? A University.

Q Here at the Ohio State University? A Yes, sir.

Q Do you know how long you were at that hospital?

A No, sir; I don't.

Q And did you subsequently go to a hospital after the University hospital? A Yes, sir. They sent me to Worthington, [322] Ohio, Harding Sanitarium.

Q Do you know how long you were at that hospital, or sanitarium, rather? A I was there nine weeks and four days, I think.

Q And were you at any other hospitals or institutions of similar character? A At V. A. hospital, Richmond, Virginia.

Q Which hospital is that? A V. A. at Richmond, Virginia.

Q V. A.? A That is a government hospital for veterans.

Q How long were you confined in that hospital?

A 60 days.

Q Were you put in other hospitals, or did you undergo any other medical treatment from that point on? A I was at Catawba Sanitarium.

Q Where is that? A That is out from Salen, Virginia.

Q How long were you at that hospital? A 25 days.

Q And were you at any other medical institution after leaving Catawba? A Marion General hospital, I returned there.

[323] Q Marion General hospital, and where is that?

A That is at Marion, Ohio.

Q And is that where you presently are? A That's right.

Q How long have you been at Marion General hospital?
A Sometime in February I went in and I am still there.
Q February of this year? A Yes, sir.
Q And you are still there? A Yes, sir.
Q Now, Luther, do you have any use, that is, the ability to use your right arm? A No, sir.
Q And do you have any movement in your right arm, in the shoulder area? A I have some movement, but it goes to jumping on me and hurts me and I can't use it. I tried to use. It goes to jumping on me and it goes to hurting me back here (indicating).
Q Have you been able to do anything of a gainful nature since the time of your accident on June 25, 1952? [324] A I have not.
Q Can you tell us just what disability, if any, you have with regard to your left hand? A It is kind of stiff and it freezes sometimes, just gets awful cold.
Q Some of your fingers are off that hand? A Yes, sir. Two of them.
Q How about the fourth finger? Can you tell us what functional use you have of that? A I don't have much use of it. You can see I can't bring it down.
Q Mr. Creasy, you are talking very low again. A I say it just won't break down no further. I can't get it down any further.
Q Now, are you able to feed yourself, Luther?
A After it is prepared for me, I can use a fork all right.
Q And can you dress yourself? A No, sir.
Q Well, can you do some part of your dressing?

A Oh, yes. I can do some of it.

Q Well, tell us what parts of your dressing you are able to do and perform and how much you can't perform. [325] A Well, I can get my pants on and these shoes that I wear, I can get those on most of the time. Sometimes I skin my finger on it.

Q Would you mind stepping down off the witness stand for a moment? A (Witness does as requested by counsel.)

Q Will you display to the jury the type of shoes you wear? A I wear these boots, the Army and Navy boots. I can get them on. They have a strap on them to pull them off or on.

Q All right, Mr. Creasy A (Witness resumed the witness stand.)

Q Now, why are you wearing boots? A Because I am not able to lace any other shoe on.

Q Is that the type of footwear you are accustomed to wearing? A No, sir.

Q Luther, the injuries which you sustained in this accident were to what part of your body? A To my arms and fingers and the hole in my head and in my side, the right side.

Q Did you receive a burn in the body as well?

[326] A Yes, sir.

Q Now, since the time that you became aware of yourself in the White Cross hospital, as you told us, have you been in any pain at all as a result of these injuries? A Pretty much.

Q Sir? A A lot of it.

Q Tell us where you get this pain that you do have?

A I get it a little through my chest here and I get it in my shoulder. I get it in these fingers.

Q Is that with you constantly, or is that on and off? A No, it is on and off.

Q Go ahead, if you have something. A Rainy days, damp weather, I get worse.

Q Now, Dr. Lastrapes testified here today with regard to an operation which was performed on you at Marion General hospital recently. What was the condition as it affected you that required you to be at Marion General hospital? A Well, it was in my shoulder. That was such a pain I had in there that I just walked day and night. I couldn't sleep; I couldn't rest. I even had [327] my sister up driving me around and I had to go to the Marion clinic to see if this Dr. Birch and Dr. Lastrapes -- I went there and he tried treatments. Finally he said he would have to put me in the hospital. I went to the hospital. Then he tried to knock it out by narcotics which didn't get so it did have any effect on me. So then, he had to take me down and operate.

Q Now, since the operation have you been relieved of the pain in that area? A I have; yes, sir.

Q And are you under any form of medication at the present time? A I am.

Q Is that medication in connection with the injuries which you suffered on June 25th, or is that for some other purpose? A It is for the purpose of my lungs, eight or ten different medicines I take for that.

Q Do you take any medication at all for the injuries which you sustained in the accident of June 25, 1952? A Once in a while I have to take some.

Q Why is that necessary? A Because it is so painful

I can't sleep. I can't sit down so they have to give me something to ease [328] the pain.

Q Luther, do you think that you will be able to improve your condition in any way? A Well, I am hoping Dr. Lastrapes can be operating again. He says he wants to build me up some before he can do it

Q Do you desire to improve yourself? A I wish to, I hope to.

Q Do you have any means at all of earning a livelihood in your present condition? A I don't know anything right now that I could do until I get better.

MR. GLICK: Your witness, Mr. Gingher.

CROSS-EXAMINATION BY MR. GINGHER:

Q Do you feel able to proceed with further questioning?

A Yes, sir

Q Now, as I understand it, you had been on that job for two or three weeks? A Yes, sir.

Q And you had worked on all of the poles at one time or another on the job, hadn't you, Luther? A I had, yes

Q And on this pole on which you had been [329] injured, you had worked on that pole before that day? A I had.

Q Yes. Now, what was the nature of the work that you did on that pole before that day? A Before that day I had put these wires on buck arms, what they call framing the poles.

Q Framing them? A Yes, sir.

Q What do you do when you frame the poles?

A You put the material on them

Q Put what? A Material on them, working material.

Q Working material on the crossarm? A Yes, sir.

Q What is the working material? A That is whatever they are going to hook on there to dead end, that is, your Johnny balls.

Q What are the Johnny balls? A They are an insulator. They have an assembly in them that the wire goes around, something like insulators.

Q You had been up on this pole several times before this day then? A I had.

Q And you had stood on this same crossarm [330] before this day? A I had.

Q Now, on this day when you went up, when you were hurt, you started up the pole with your spikes into the pole; is that right?

A That's right.

Q Now, did you have the rubber overshoes on?

A Yes, sir.

Q And were they in good condition? A Yes, sir.

Q I hand you what is marked as Exhibit D-2. Is that the type of shoes you had on? A Well, I don't know whether that size.

Q Not the size. I mean is this the same kind?

A Same kind of overshoe.

Q That's right. Now, there is one thing I don't understand. How do your spikes go on? A They went on over here. They stuck out -- hang out over here.

MR. GLICK: May we, for the record, indicate?

MR. GINGHER: I am going to take care of it now.

Q You were indicating that the spike stuck out from the side

of the overshoe in about the center of [331] the shoe?

A Right back against the heel.

Q Right back against the heel? A That's right.

Q Now, how did that hold on, that spike? It stuck straight out. A No.

Q Was it down? A Down, just in an angle like.

Q You were able to walk with your spikes on, were you not? A Yes.

Q On the ground I mean? A Yes.

Q The spikes didn't interfere with your walking?

A It bothered you some, you don't walk as good.

Q Yes, but they don't stick in the ground as you walk along? A No.

Q They were up high enough they didn't stick in the ground. So the thing that came into contact with the surface on which you were standing was the sole of the rubber overshoe? [332]

A That's right, on the ball of your feet.

Q Now, how was the spike held in place? Was there something around your leg? Did it go in your overshoe or how was it held in place? A The spike is on a steel brace, comes up along here; get them different sizes, 14, 16, leg brace, and then you had a strap, leather strap that went around here and buckled and then you had a pad up here.

Q Pad? A Pad and another strap that you strapped on just below your knee.

Q When you put the spike in, what kept it from pushing up as you climbed? Was there anything on your feet? A Oh, yes. You have a steel.

Q That is what I wanted to get. You have a steel right under the feet? A That's right.

Q But that is in the arch of your foot and against your heel, isn't it? A That's right.

Q Now, you went up this pole with your spikes in the pole? A Yes, sir.

Q That is the way you had to go, isn't it? [333] A Yes, sir, the only way you could get up.

Q Now, as I understand it, you say that all of the wires were covered -- all of the hot wires were covered on that pole. Did I understand you to say that? A No. Not all the hot wires was covered. All the hot wires was covered on the side I was working on.

Q Well, now, as you went up this pole, how close did you come to this buck arm that you say you stood on before you left the pole?

MR. GLICK: I object to that. I think that is rather confusing, how close did he come to the buck arm that he said he stood on.

THE COURT: If the witness can't understand--

Q How far up the pole did you get? Where were you with reference to the buck arm, was it above your head or was it even with your head or at your knees, or where was it when you left the pole to get onto the buck arm? A Well, I just stepped and like climbing up the pole onto the buck arm.

Q Now, you say you stepped from the pole. You were in an erect position, were you? You were climbing the pole and then you climbed past the buck arm, [334] apparently, so that you could

step off onto it; is that right? A No.

MR. GLICK: If your Honor please, I object.

A (Continued) No, sir.

MR. GLICK: Just a minute, Luther.

MR. GINGHER: What is the objection?

MR. GLICK: Mr. Gingher adds to what the witness says. He puts in it the fact he stepped above it, apparently, and I submit that is very misleading to the witness.

THE COURT: I think he is asking, trying to find out from the witness what he did.

MR. GLICK: Well, I think the most direct way to do that is to ask him. I don't think he should be placing suggestions in the question and then inject into it "apparently" because that is the type of question that is confusing, and I submit a man of this type of education should be asked a simple question.

THE COURT: This is cross-examination and Mr. Gingher is conducting it. I see nothing objectionable to it.

Q You said, Luther, that you stepped off onto the crossarm. That is right, isn't it? A I stepped from the pole onto the crossarm.

[335] Q From the pole onto the crossarm? A Yes.

Q Then all of your body was above the crossarm, or most of it, when you stepped off onto it, wasn't it? It would have to be, wouldn't it? A My body would be?

Q Yes. A Yes.

Q That's right. Now this crossarm was within two feet of the one just above it, wasn't it? A That's right. They are

two feet apart.

Q And the one just above it was the top crossarm, wasn't it? A That's right.

Q Now, did you come up through the wires on the top crossarm before you stepped off, or were there any wires at all on that side? A There was no wires at all on that side.

Q None of any kind? A No, sir.

Q Now, when you stepped off onto the crossarm, did you look at the crossarm? A I think I looked down when I put my foot down.

Q You would look where you were going to [336] step?
A That's right.

Q Did you observe anything different about that crossarm than any other crossarm you had seen? A No, sir.

Q There was nothing unusual about its appearance?
A No, sir.

Q Now, before you stepped off onto that crossarm, you were not safetied to the pole, were you? You were just climbing free, you had no belt around the pole? A Climb with your hands and feet.

Q Just climbing with your hands and feet? A Yes.

Q Now, you could have safetied up to the pole before you stepped off, couldn't you?

MR. GLICK: If your Honor please, I object because now we are going into a field of speculation.

A Not and done my work.

THE COURT: I will overrule the objection.

Q You could have safetied, as you call it, onto the pole

before you stepped off onto the crossarm, could you not? A I could have safetied off, put my belt [337] around it, but I would still have to move it, so we hardly ever do that.

Q Well, but you were above the crossarm before you stepped off. You have just said that your body was above it. Now, you could have safetied off at that point, could you not?

MR. GLICK: The other qualification--

MR. GINGHER: I hope counsel will not constantly interrupt.

MR. GLICK: I did not interrupt. I am objecting.

MR. GINGHER: You didn't say so.

MR. GLICK: I ask there be a clarification of safetying off. One was with the belt and the other with equipment.

MR. GINGHER: I am talking about safetying off with the belt, first.

Q You could have put the belt around the pole before you stepped from the pole to the crossarm? You could have done that, couldn't you? A I could have had the belt on safetied around the pole all the way up. I have done it.

Q You didn't do it on this occasion? A No, sir.

Q You got out onto this crossarm and you [338] were standing erect on that crossarm before you even safetied to the pole. That is right, isn't it? A You know how the crossarm set on the pole, don't you?

Q Well I have seen pictures, Luther. If you want to explain it you go ahead. A This arm was only about four inches wide

Q Four inches wide? A Yes. I was standing right

by the pole with my arm around the pole and my feet on top of that arm, and then I safetied out and then I moved my foot over to turn around and get my rubber goods, and that is when I don't know what happened.

Q You say now you had your arm around the pole when you stepped off? A Oh, yes.

Q And you looked at the arm before you stepped, then you put your safety belt around the pole and around yourself: is that right? A I already had the one around myself.

Q First attached it to yourself? A Yes.

Q You put it around the pole and attached it to yourself? A Yes

[339] Q Now, did you move away from the pole then? A I just laid back in my belt. Your safety belt has to come tight against the pole.

Q And you laid back against it? A That's right.

Q Well, when you say "laying back", did you move out farther on the crossarm? A Oh, yes, after I laid back.

Q You moved out farther on the crossarm and you laid back; is that right? A That's right. You go back to where you feel yourself comfortable in your belt, in safety.

Q Then you laid back. At that time you moved out on the crossarm, did you, away from the pole? A I was standing on the crossarm right by the pole.

Q Yes. But when you laid back, did you move away from the pole? A I don't remember. I just remember slipping my feet.

Q You don't remember whether you moved away from the

pole or not? A No, sir.

Q But you said you laid back. Will you tell us what you mean by laying back? When you laid [340] back, what did you do, Luther? A That is the last I remember. My feet just went out. I just felt my feet slide like.

Q Didn't you lay back before you reached for your safety equipment, your gloves and sleeves? A Oh, yes. You always get your equipment and rest position and get your gloves on.

Q What I am trying to get at is, these things as they happened. You just said you laid back and that is the last you remember. A That's right.

Q You don't remember reaching for your safety equipment? A Yes, while I was reaching for it. I hooked my safety belt. I was at an angle, just raised the safety belt up or down, brought you into the pole or away, which you have to work tight with it.

Q Well, the safety belt was going down in that position, was it not? A No, it was the safety belt should have been up around like this on an angle.

Q Now, Luther, you were standing on the buck arm which was just two feet under the top? A Yes, sir.

Q So you only had two feet on which to [341] attach your safety belt, didn't you? A That's right.

Q And if you were standing up, then the angle would be up towards you, wouldn't it? It would have to be, wouldn't it? A No, sir, not above your braces. You have your braces comes down, steel braces, about two inches wide.

Q Well, now, when you were up there you had nothing to support you before you reached for your gloves, except the belt,

the safety belt. That is right, isn't it?

MR. GLICK: Just a minute. Don't answer that question. Objection because the question incorporates only a part of the support. The witness has already testified he was standing on a buck arm. You can't exclude that as a basis for support.

THE COURT: Overrule the objection.

MR. GINGHER: I am not attempting to, of course. Pardon me. I will withdraw that.

Q Luther, you were standing on the buck arm and you had the safety belt around the pole and you were back some distance from the pole, you were not touching the pole then? A No.

[342] Q So that, you had nothing to balance you on that buck arm except the connection between you and the pole; is that right?

MR. GLICK: Now, if your Honor please, I object.

THE COURT: Overrule the objection.

MR. GLICK: May I state the objection, sir?

THE COURT: I don't think it is necessary. The question asked, I feel, is all right. You make an objection just when the witness is ready to answer the question.

MR. GLICK: Well, of course, that is the proper time to make the objection, sir.

THE COURT: Yes, if it is a good objection. I will overrule the objection.

MR. GINGHER: Will you read the question to him now?

(Thereupon the last question was read by the reporter.)

Q (Continued) Connection by the safety belt, that was the only thing you had to balance you as you stood on that buck arm?

MR. GLICK: If your Honor please, I want the record to

indicate that I note an objection to the fact that there is excluding now, not a question of balance, the fact he is standing on his own feet as a matter of [343] balance.

THE COURT: Read the question.

(Thereupon the last question was read by the reporter.)

THE COURT: The question embraces "as he stood on the buck arm."

MR. GINGHER: Yes. Now, will you answer it?

Q (Continued) You had nothing else to hold on, you had nothing to hold with your hands? A No, my hands was free.

Q Your hands were free. Now, isn't it a fact, Luther, that when you get your equipment, it is around on the side, and you have to at least turn and jerk yourself in order to get that equipment to put it on? A Not necessarily jerk yourself. You don't do that in hot wire

Q Do you remember when your deposition was taken the other day at the hospital? A Yes, I do.

Q Do you remember that? A Yes, sir.

Q I will ask you if this question was asked you and if this answer was given there, Luther:

"Question: You are talking about, in order to be able to reach out to reach that rubber hose, you had to take your spikes out, is that correct?"

[344] MR. GLICK: Now, Mr. Gingher, can we have a reference to the page you are on?

MR. GINGHER: 58.

Q (Continued) Do you remember that question being asked you? You can answer that yes or no. Do you remember Mr.

Elam, my associate, asking you that question up there? A I don't remember just the question, no.

Q Well, see if you remember this answer:

"Answer: Take them out of the pole, yes. I was standing on the buck arm when I turned around, twisted around. Why, you can see a lot of times with your belt hooked to the pole, why, you will jerk yourself a little. So when I went to get my glo es that is the last thing I remember."

Did you give that answer? A I probably did.

Q Well, that was true, wasn't it? A Well, that's right.

Q Yes. A On a hot arm, you don't jerk yourself on a new pole because it has hot wires. That is where you check the wire into one another, so we make it a habit of taking it easy.

Q Yes. But this answer you gave was correct, about what you did on that occasion, wasn't it? [345] A When I turned around, why, I didn't mean to say I jerked myself. I said you had to move around with your hands to get your rubber equipment out of your bag there. You can see how complicated it is to carry that stuff.

Q Let's read this answer again. This is the answer which the deposition indicates you gave and the court reporter took this down. I will read it again.

"Answer: Take them out of the pole, yes. I was standing on the buck arm when I turned around, twisted around. Why, you can see a lot of times with your belt hooked to the pole, why, you will jerk yourself a little. So when I went to get my gloves that is the last thing I remember."

Now, you did give that answer, didn't you? A I did.

Q That is true, isn't it? A That is not the truth, that I jerked myself.

Q You said that you did, but now you want to say you didn't. A On some poles you can twist yourself all the way around in your belt, on some poles that you are taking out that there is no wires on.

THE COURT: We will take our recess at this time.

[346] (Thereupon a short recess was had.)

THE COURT: Will you resume the stand?

MR. GLICK: Mr. Creasy, will you go back to the witness stand?

(The witness resumes the witness stand.)

MR. GINGHER: Mr. Creasy, who was on the pole when you went up that day that you were hurt?

A Sonny Aldrich.

Q Sonny Aldrich. Now, where was he? A He was on the top arm.

Q He was on the top arm? A Yes, sir. On the other side from where I was at.

Q He was on the top arm on the other side. Was he standing? A Yes, sir, he was standing.

Q What was he tied to? A I never noticed whether he was on the arm, tied around the arm or the pole.

MR. GINGHER: Would the jury like to have that last answer read? Perhaps it should be, if you don't mind.

(Thereupon the last answer was read by the reporter.)

Q Did you notce that he had his safety equipment on?

[347] A No, sir; I didn't.

Q Beg your pardon? A I didn't notice.

Q Did you speak to him when you got up to the top? A No, sir.

Q Was he going to work with you? A No, sir.

Q Do you know why he was up there? A No.

Q Now, it was the practice of the Hoosier Engineering Company to hold safety meetings regularly, was it? A Yes, sir.

Q And you were told in those safety meetings to work all of the wires as though they were hot, were you not? A Yes, sir.

Q That is the way you did it? A Yes, sir.

Q And you were instructed and told to cover up from underneath, were you not?

MR. GLICK: I object to that, unless there is a foundation for that.

THE COURT: Overrule the objection.

[348] MR. GLICK: The rules have already been introduced into evidence or have been marked for identification.

Q (Continued) Isn't that right, you were told to cover up? A All wires.

Q From underneath, isn't that true? A It is true, you climb to them and then cover them.

Q And when you say you climb to them, they are overhead? A Oh, yes

Q When you cover up? A Yes, sir.

Q And when we talk about covering up, we mean putting on your rubber gloves and sleeves? A That's right.

Q Now, your brother was your foreman, wasn't he?

A Yes, sir.

Q You say that Mr. Long told you to change some clamps?

A Yes, sir.

Q Now, as a matter of fact, you asked your brother about it and he told you to do what Mr. Long said; [349] is that right?

A That's right.

Q So that you were following your brother's instructions in doing whatever Mr. Long said?

MR. GLICK: Just a moment, your Honor.

A I was following Mr. Long's--

THE COURT: Wait a minute.

A (Continued) --instructions.

THE COURT: Just a minute. Don't answer the question. If you object, I will sustain it. I think that is a conclusion.

MR. GINGHER: Very well.

Q But your brother, who was your foreman, did tell you to carry out Mr. Long's instructions; is that what you said? A Yes.

MR. GLICK: May I object, unless a time is fixed about the statement that is incorporated in the question, because the testimony clearly indicates it was not at this particular time.

MR. GINGHER: Very well.

Q Was it before the time that you were injured that your brother told you that? A Oh, yes. Before the time I was injured

Q And was it while you were working on the [350] Hicksville job? A Yes, sir.

Q Now, Luther, isn't it a fact that the last thing you remember is reaching for your gloves? A That's right.

Q And you were standing on the crossarm at the time?

A I was.

MR. GINGHER: That is all.

REDIRECT EXAMINATION BY MR. GLICK:

Q Luther, isn't it a fact that while you were reaching for your gloves, something happened to your feet?

MR. GINGHER: I object.

THE COURT: Sustain the objection for two reasons. First, he answered that question on cross-examination; second, your question is a leading question and does not ask him to state a fact.

MR. GLICK: In view of the Court's statement, I will withdraw the question. I don't want the jury --

THE COURT: Don't argue.

MR. GLICK: No further questions. You may step down.

Now, if your Honor please, we should like to [351] put into evidence, in accordance with the pre-trial order, the life expectancy as set forth in the actuarial tables. There is a pre-trial provision for this.

THE COURT: You may state it.

MR. GLICK: Now, Mr. Gingher, the order provides for the use of the tables used in the Ohio practice. Are you familiar with the tables that are used?

MR. GINGHER: Yes, sir.

MR. GLICK: For the record, the American Experience Table, which is made a part of the Revised Statutes of Ohio, indicates that at the age of 37 years, the life expectancy is 30 to 35 years. And for the record, we should like to have one

further indication that the distance between the weather station at Van Wert --

MR. GINGHER: Just a minute. I don't know whether you are going to state it or not, but there should be some proof of it from a reliable source.

THE COURT: The Court will accept it if it is on the map there. If the map gives it, the Court can accept it.

MR. GLICK: Mr. Mellman, you measured the distance on the map?

MR. MELLMAN: I was in the United States Marshal's office and we used the ruler to measure the distance between Van Wert station and Hicksville. The [352] mileage is 30 miles.

MR. GLICK: Will you accept that for the record?

MR. GINGHER: The Court said he would accept it. I didn't.

THE COURT: The Court will accept it.

MR. GLICK: Do you have any objection?

MR. GINGHER: Yes.

THE COURT: Overruled.

MR. MELLMAN: For the completeness of the record, that is taken from an official map issued by the Ohio Department of Highways issued in 1955.

MR. GLICK: What is the scale of the map, Mr. Mellman? State that.

MR. MELLMAN: One inch equals ten miles, I believe it is.

MR. GLICK: It indicates that one inch equals ten miles

and did you measure it with a ruler and it indicates 30 miles by that method of measurement?

MR. ELAM: Would you note our exception?

MR. GINGHER: I withdraw the objection.

MR. GLICK: That is what I was going to address the Court about, because if Mr. Gingher persisted in his objection—

MR. GINGHER: I have withdrawn it.

[353] MR. GLICK: I just wanted to explain or --

THE COURT: Let't not have so much explanation. If it is withdrawn, that ends it.

MR. GLICK: If your Honor please, that is the plaintiff's case.

THE COURT: You rest now, Mr. Glick?

MR. GLICK: We rest.

MR. GINGHER: There are certain legal matters before we proceed. Perhaps the Court might wish to discuss them with us.

THE COURT: Excuse the jury and ask you to retire to the jury room until called.

(Thereupon the jury retired to the jury room and the following proceedings were out of the presence and hearing of the jury:)

MR. GINGHER: The defendant now moves the Court for an order directing the jury to return a verdict in favor of the defendant, for the reason that the evidence of the plaintiff fails to establish a cause of action against the defendant.

* * *

[Page 353, line 23 - Page 358, line 17]

THE COURT: Mr. Glick, I have examined all of your cases and I think none of them are applicable to the situation which we have here. One case of the Second [354] Circuit in which Judge Hand was sitting, does not involve similar facts to this at all. As I recall there, a subcontractor had done work for a power company, or some owner, and left the line sag, I believe, or had not properly done their work. Nothing was done about this by the owner. Here a third party, someone else not connected with the subcontractor or the owner of the company, was injured. As I recall, they held there that the owner company was negligent for not properly supervising and getting into proper condition the work that had not been done right

Aside from all these cases that you cite, we are bound here in this case by the law of Ohio, and not only this court, but the United States Court of Appeals and the Supreme Court, must follow the law of Ohio in this regard. I think there has grown up in the law of Ohio, as indicated by several decisions by the Supreme Court of Ohio, -- and I think this is not peculiar to Ohio, I think it is pretty generally the law -- and the rules are established and followed in this type of case, and in Wellman vs. East Ohio Gas Company, it is a pretty late case, decided July 1, 1953, the Court stated the rule: "The rule of general acceptance is that where an independent contractor undertakes to do work for another in the very doing of which there are elements of real or [355] potential danger and one of such contractor's employes is injured as an incident to the performance of the work, no liability for such injury ordinarily

attaches to the one who engaged the services of the independent contractor. Such principle was recognized and applied in the following cases: " --and then they continue: "or, stating the matter a little differently, one who engages an independent contractor to do work for him ordinarily owes no duty of protection to the employes of such contractor, in connection with the execution of the work, who proceeds therewith knowing and appreciating that there is a condition of danger surrounding its performance.

"It is always important to remember that in order to establish 'actionable negligence' three essential elements must be shown, namely, a duty or obligation on the part of the person charged with such negligence to protect another from injury, a failure to discharge that duty, and an injury to such other proximately resulting from such failure."

I think the facts in that case very closely resemble ours. There the East Ohio Gas Company had a subcontractor laying pipe for it and an employe of the subcontractor was injured. In that case, the employing company, or owner company, took a far more active part than was taken by the Ohio Power Company in this case.

[356] The company there had actually turned the gas into the mains. And then, the Schwarz case, 163 Ohio State, goes along and follows the law of the Wellman case.

You are bound to show some negligence on the part of the Ohio Power Company. I have watched from the time of the opening statements and listened carefully to the evidence here and I find nothing that would indicate any negligence on

the part of the Ohio Power Company. If the Court were to sustain this position, it would mean that all public utility companies must stop using creosoted poles and crossarms. Now, of course, if it is wrong for them to do so, they should stop regardless. But an accepted practice of that sort, the Court could not easily come to the conclusion that that was wrong.

The rule in these cases of independent contractor where the owner has been held liable, all relate to matters of some latent defect or something in the nature of an infraction, which the plaintiff would not have known or anticipated. For instance, the one Ohio case that you cited in 146 Ohio State, a ladder was supplied that was defective. But matters that are open knowledge available to one side as equally as to the other, where there are no hidden defects or latent defects, the rule has been that it is not negligence.

Here is a lineman who had been a lineman for [357] 22 years. The testimony shows that all public utility poles and arms are now creosoted. He had been up this pole over and over again. His crew assisted in putting it up. He knew all about it and knew all the potential dangers of the energized lines that were on the poles, and he knew just as much as the Ohio Power Company did about it. So, I think that there is an utter failure of showing any negligence on the part of the defendant power company.

As to the matter, that it must be submitted to the jury to determine negligence, regardless, is not correct, for the reason that in cases you have cited here the Supreme Court held that a directed verdict should have been given, and in the

Ford Motor case recently decided by the 6th Circuit Court of Appeals, it was likewise held that a directed verdict should have been granted.

Then, I think coming to the other phase of the case as to whether or not there is negligence on the part of the plaintiff as a matter of law, the Court must conclude that there is. The rules which have been read here stated that they were to put on their equipment when they got to the primary area. I don't think there can be any question of the interpretation that the primary area means the first hot wire.

[358] Regrettable as the incident is in this case, the Court must arrive at this conclusion, and I do sustain the motion of the defendant for a directed verdict.

MR. GLICK: May I note an exception, particularly so with your findings on the law of independent contractor, that your Honor has failed in your order dismissing, to note the inherent danger rule as available to the plaintiff in this case, and the finding of contributory negligence as a matter of law, when actually the acts involved were not a contribution to the accident itself, but are a question of proximate cause, the accident having been the slipping rather than the failure to wear the gloves, and that the Court errs in viewing that as contributory negligence which is more a result rather than a cause. I desire exception to be noted in the record for that purpose in line with a general exception.

* * *

CONTRACT FOR THE CONSTRUCTION OF ELECTRIC DISTRIBUTION LINES

THIS CONTRACT, made and entered into this 1st day of November, 1948, by and between THE OHIO POWER COMPANY, an Ohio corporation (hereinafter called "Company") and HOOSIER ENGINEERING COMPANY, a Delaware corporation having its principal place of business in Columbus, Ohio (hereinafter called "Contractor").

W I T N E S S E T H ,

T H A T :

For and in consideration of the premises and the mutual agreements and undertakings of the parties hereto, Contractor hereby agrees to erect, remove, or rebuild, in a workmanlike manner such distribution lines, or portions of distribution lines, as may be designated from time to time by Company in the operating territory of Company in the State of Ohio, in accordance with the general conditions marked Exhibit "A", and Price Provisions and Schedules of Unit Prices marked Exhibit "B", each of which is attached hereto and made a part of this contract. Contractor acknowledges by the signing hereof that the aforesaid exhibits have been furnished to him prior thereto and that he has examined them and knows and understands their contents.

DESCRIPTION OF WORK

The work to be executed under this contract shall consist of the furnishing of all the necessary supervision, labor, tools, equipment and facilities required for the erection, removal or rearrangement of materials entering into the erection, removing or rebuilding of the distribution lines referred to above, including the haulage of materials.

The said work is to be done to the satisfaction of Company's engineer and in accordance with requirements of Exhibit "A" and such drawings and specifications as may be furnished by Company's engineer.

MATERIALS

All materials entering into the completed structures will be furnished free of charge to Contractor.

MAPS, PLANS, SURVEYING, POLE STAKING, ETC.

Company will do all necessary surveying, mapping and pole staking for locations of poles, guys, and other appurtenances. Company will also furnish necessary structure lists, specifications and special instructions for the work to be done.

COMPANY'S RIGHT TO TERMINATE AND COMPLETE WORK

If Contractor should be adjudged a bankrupt, or if it should make a general assignment for the benefit of its creditors or if a receiver should be appointed on account of its insolvency, or if it should persistently or repeatedly refuse or fail to supply enough properly skilled workmen, or if it should fail to maintain the schedule of construction, or if it should fail to make prompt payment to subcontractors or for supplies and labor, or if it should persistently disregard the decisions of Company's engineer, or if it should otherwise be guilty of a substantial violation of any provision of the contract, then Company, upon the certificate of Company's engineer that sufficient cause exists to justify such action, may, without prejudice to any other right or remedy, and after giving Contractor forty-eight (48) hours written notice, terminate the employment of Contractor and finish the work by whatever method it may deem expedient.

In case of such termination, an estimate shall be made immediately of all work satisfactorily completed by Contractor, but it

shall not be entitled to receive any further payment for such completed work until all work already designated by Company as provided in this contract is wholly finished.

Final payment shall be made at contract rates for all work satisfactorily completed by Contractor up to the termination of this contract.

TERMINATION OF CONTRACT

This contract may also be terminated at any time by either party hereto giving to the other party a ninety (90) days prior written notice of termination. Unless previously terminated as heretofore provided, this contract shall continue in force and effect for a period of three (3) years from the date hereof upon which date it shall then automatically terminate.

This contract terminates and supersedes contract No. 1440 dated November 1, 1945 between the parties hereto.

PAYMENTS TO CONTRACTOR

Company, in consideration of the undertakings of the Contractor, as herein set forth agrees to pay Contractor in accordance with the Price Provisions and Schedules of Unit Prices marked Exhibit "B".

Payments will be made as jobs are completed or oftener as mutually agreeable, provided said work is performed in accordance with the terms of this contract. Bills rendered by Contractor to Company shall be due and payable ten (10) days after their approval by Company, but Company may withhold approval of any such bill until Contractor furnishes Company with satisfactory evidence of the release of any and all liens which may have been placed against the work and/or against either or both of the parties hereto in connection with said work.

Acceptance by Contractor of payment of any bill rendered by him to Company shall constitute a waiver of all claims by Contractor against Company in respect to the work covered by such bill.

IN WITNESS WHEREOF, the parties hereto have caused this contract to be executed the day and year first above written.

[initialled]
HAE
FAL 10/14

THE OHIO POWER COMPANY

By /s/
President

Approved as to form
/s/ TFJ
Counsel

ATTEST:

/s/ A. E. Craig
Assistant Secretary

HOOSIER ENGINEERING COMPANY

By /s/ F. E. Bettendorf
Executive Vice President

ATTEST:

/s/ Eileen Forrester
Assistant Secretary

EXHIBIT "A"

GENERAL CONDITIONS FOR OVERHEAD WORK

SCHEDULE OF WORK

Company will notify Contractor in writing of the date for starting any job. Contractor shall start work not later than five (5) days after such date and shall prosecute the work diligently so as to complete it as rapidly as is consistent with thoroughness and good workmanship. If required, a schedule of construction shall be drawn up by Company's engineer in collaboration with Contractor and Contractor will be held responsible for maintaining this schedule by every means within its control.

COMPANY'S ENGINEER

Company will notify Contractor of the appointment of its engineer. The engineer will act throughout the progress of the work as the direct representative of Company in all matters pertaining to the work or the interpretation of the plans and specifications and all work shall be done to his complete satisfaction. He shall have unrestricted access to the work at all times so that he may inspect the quality of materials furnished by Contractor and of the workmanship performed by Contractor, so as to determine to his satisfaction that such materials and workmanship are in accordance with the terms, conditions and specifications provided in the contract. No work shall be started until it has first been laid out in the field by the engineer and Contractor shall not proceed until such work has been so laid out. The engineer will arrange for all necessary clearances on electrical circuits.

The engineer may, by written notice, require the Contractor to withdraw forthwith from the work such employees or workmen as he deems incompetent or careless.

The engineer may require Contractor to cease work at any point and to work at such other points as he may direct, whenever in his opinion such change may be necessary to insure the orderly execution of this contract or the work of others.

The engineer may delegate, in writing, any part of his authority to one or more representatives, who in his absence shall have such authority in respect to the work as is hereby given the engineer.

TOOLS AND EQUIPMENT

Contractor shall furnish in good condition and repair, complete and ready for operation, all tools and equipment necessary for the economical prosecution of the work.

DRAWINGS AND SPECIFICATIONS

Contractor shall specify the latest date it will need to be furnished with the various drawings in order to complete its work. Detail and working drawings will be furnished by Company's engineer from time to time as they become necessary and as per agreed schedule, and the work shall be executed in conformity with such drawings and with such interpretations and explanations thereof as may be given by Company's engineer.

The drawings and specifications furnished by Company's engineer are the property of Company and shall be used only for the purpose of this contract and they shall be returned to Company upon completion of the work.

The drawings and specifications are intended to supplement each other and shall be considered complementary. Therefore, it will not be the province of the specifications to mention any item or portion of the construction which the drawings are competent to explain and vice versa. An omission of a portion of the work, or an item thereof, from the specifications shall not relieve Contractor from carrying out such work or from furnishing such item when indicated on the drawings only, and likewise work or items required by the specifications but not shown on the drawnings are to be supplied as though shown on said drawings.

Any items necessary to the completion of the work shown which may not be actually indicated on the drawings or mentioned in the specifications, but which are obviously necessary and usually employed in common practice shall be supplied in place as a part of this contract.

Discrepancies between drawings and specifications shall immediately be referred to Company's engineer, who shall interpret the true intent and meaning of the drawings and specifications and his interpretation shall be final unless Company, on its own initiative, shall modify or change such interpretation.

No part of the work requiring detail drawings shall be performed until such detail drawings have been furnished by Company's engineer.

Figures must take precedence in all cases over the scale measurements of drawings but where obvious discrepancies exist between figures, Contractor shall consult Company's engineer, who shall determine which figure Contractor shall use.

Contractor shall keep one copy of the specifications and one copy of all drawings at the job and shall produce them whenever asked to do so by Company's engineer.

DISPUTES

The decision of Company shall be final and abided by in case of disputes arising between Contractor and Company's engineer regarding any decision made or order issued by Company's engineer or his representatives.

CLEAN UP

Upon completion of any work done hereunder, Contractor shall remove all its own equipment and all excess materials furnished by Company, and shall leave the premises cleaned and cleared to the satisfaction of Company's engineer. Excess materials furnished by Company shall be delivered by Contractor to Company as directed by Company's engineer.

CONDEMNATION AND CORRECTION OF DEFECTIVE WORK

Contractor, upon receiving written notice from the Company's engineer and within the time mentioned therein, shall, at Contractor's sole expense, remove and replace all portions of the work performed by it and condemned as failing to conform to the contract, and Contractor shall also bear all expense of the removal and replacement of any adjoining work damaged or disturbed by removal of such condemned work. The value of Company's materials removed from such condemned work which in the opinion of Company's engineer, are damaged so as to be unsuitable for reuse in the work shall be deducted from any money then due or thereafter to become due to Contractor.

If Contractor does not, within the time mentioned in such notice, remove, replace and make good all condemned, damaged, disturbed and defective work, and materials, Company may have such removal and replacement done by others and thereupon deduct the cost thereof from any money then due or thereafter to become due to Contractor.

PROTECTION OF WORK

Contractor shall use care and diligence and shall see that all work performed shall at all times be guarded and protected from any and all loss or damage until the work done is accepted by Company. Any loss of or damage to the work performed prior to its acceptance by Company due to Contractor's failure to properly guard or protect such work shall be made good by Contractor at its own expense.

PROTECTION OF MATERIALS

Contractor shall use care and diligence to protect all materials furnished by Company, after receipt thereof by Contractor, against loss, breakage, or any and all damage. It is agreed and understood that, in case of loss, breakage or damage to materials, Contractor shall assume liability for any amount over one-half of one per cent (1/2%) of the total value of all materials furnished it on any designated project.

Company shall not be responsible in any way for property of Contractor, its employees or subcontractors, or of any person performing any part of the work.

PROTECTION OF PUBLIC

Contractor shall put up and maintain all necessary signs, signals, red lights, guards, protective enclosures, platforms and notices as may be necessary to adequately protect the work and to protect all individuals against injury to their person or damage to their property.

TAXES

All taxes of whatsoever kind, nature and description, payable in respect to the performance of this contract are to be paid by Contractor unless otherwise required by law.

INSURANCE

Contractor agrees to furnish and maintain during the period of this contract, and at its own expense, policies of insurance covering:

(a) The legal liability of the Contractor and/or subcontractors who may be engaged in the work, to pay claims for personal injuries to Contractor's and/or subcontractors' employees and for death resulting therefrom under the Workmen's Compensation Law applicable thereto; or, if the work is to be performed in the States of Ohio or West Virginia, Contractor and/or subcontractors shall be contributors to the Workmen's Compensation Fund of such state and prior to starting the work shall furnish Company with evidence thereof.

(b) The legal liability of Contractor and/or subcontractors who may be engaged in the work to pay claims for damages for personal injuries, or for death resulting therefrom, on account of accidents, including those caused by automotive equipment of Contractor, to persons other than employees of Contractor and/or subcontractors engaged in the work included in this contract in an amount not less than $50,000 for any one person and, subject to the same limit for any one person, in an amount not less than $100,000 for any one accident.

(c) The legal liability of Contractor and/or subcontractors who may be engaged in this work to pay claims for damages to property belonging to others than such Contractor and/or subcontractors in an amount not less than $5,000 for any one accident and, subject to the same limit for any one accident, in an aggregate amount not less than $25,000.

(d) The legal liability of Contractor and/or subcontractors who may be engaged in this work to pay claims for damages caused by automotive equipment of Contractor and/or subcontractors, to property belonging to

other than such contractor and/or subcontractors, in an amount not less than $5,000 for any one accident.

Before starting work Contractor shall furnish to Company for its examination and approval such policies of insurance with all endorsements, or a conformed specimen thereof certified by the agent of the insurance company, together with certificate of the insurance company evidencing the existence of such insurance, such certificate to provide that insurance company will give Company ten (10) days' notice of any cancellation or change in the terms of such policy during the period of coverage.

UNEMPLOYMENT AND SOCIAL SECURITY PAYMENTS

Prior to starting work Contractor and/or subcontractors shall furnish Company its Federal Social Security Act Employer's Account number and furnish evidence that it is a contributor to the unemployment fund of the state where the work is to be performed.

From all wages or salaries paid its employees in performance of this contract, Contractor and/or subcontractors shall deduct and withhold such taxes, assessments or contributions as are required by the Federal Insurance Contributions Act and Unemployment Tax Act and the State Unemployment Insurance Act applicable thereto, and Contractor agrees to duly report and pay over in the manner provided by law the moneys required thereby to be deducted and withheld, and to make such payments required of it by said acts, and any subcontractor shall likewise be required to agree to make such reports and payments.

LAWS, REGULATIONS AND PUBLIC ORDINANCES

All federal, state and local statutes, commission regulations, and public ordinances governing the work shall be complied with.

It is the intent to have all drawings and specifications for the work comply with all statutes, regulations, and ordinances and in case discrepancies are found between same, they shall be immediately reported to the Company.

SURETY BOND

In the event Company elects to secure a Surety Bond insuring the faithful performance of Contractor for work to be done hereunder, Contractor agrees to furnish all information necessary to enable Company to secure said bond. The premium on said bond shall be paid by Company.

PATENT RIGHTS

Contractor shall and hereby does guarantee that any method of installation or material furnished by it will not infringe upon any patents issued or pending with respect to any materials furnished or methods used by Contractor and claimed by the patentee as an

infringement. Contractor agrees to pay royalties legally claimed by any such patentee and hold Company harmless in the event of patent litigation.

SUBLETTING

Contractor shall not sublet the whole or any portion of the work to be performed hereunder without the prior written consent of Company. The name and address of each subcontractor shall be furnished to Company as soon as determined, such notice shall include particulars as to the location, nature and extent of the work involved. Approval by Company of any subcontractor shall not relieve Contractor of responsibility for the work to be performed by the subcontractor.

ASSIGNMENT

Contractor shall not assign this contract in whole or in part, nor any rights hereunder, without obtaining the prior written consent of Company.

REPORTS AND RECORDS

Contractor shall furnish Company whenever required, reports showing the progress and status of the work. Contractor shall also maintain and furnish Company with such records of work performed and items of materials and equipment installed, removed, transferred, lost, damaged, or stolen as Company's engineer may direct. All reports and records shall be presented in a form satisfactory to Company's engineer.

WAIVER OF LIEN

Contractor shall neither file nor permit to be filed any lien in respect to the work to be performed hereunder and hereby waives any right to file or cause such a lien to be filed.

Prior to final payment Contractor shall furnish the Company satisfactory evidence of payment for materials and labor.

In the event any lien has been filed in respect to the work, final payment shall not become due until all such liens have been satisfied, released and discharged of record without cost or expense to Company. Company may, in default of Contractor so to do, procure the release, satisfaction and discharge of any such lien and deduct all moneys paid to discharge such lien, including the cost and expense thereof, from any moneys which may be due Contractor; or, if final payment has been made, Contractor shall reimburse Company for all moneys paid to discharge said lien, including the cost and expense thereof.

GUARANTEE

All work shall be guaranteed against defects therein due to improper workmanship or due to an inferior quality of any materials furnished by Contractor. Such guarantee shall continue for a period of twelve (12) months from the date of completion of any work, and

all defective work shall be replaced by Contractor at its expense.

PERMITS

The Company will obtain all highway permits and other permits for such ingress and egress over the lands of others as may be required to perform the work.

HOOSIER ENGINEERING COMPANY

October 29, 1951

The Ohio Power Company
606 Second Street, S. E.
Canton 2, Ohio

Attention: Mr. W. M. Ruddicks,
Supt. of Electrical Operations

Gentlemen:

Please refer to Unit Price Contract No. 2226. This contract expires October 31, 1951.

We request that this contract, and the schedule of revised Unite Prices effective September 1, 1951, be extended for a new three year period beginning November 1, 1951, and that all other terms of this contract remain in effect.

We appreciate very much the opportunity to do this work for you, and trust that this suggestion will meet with your approval.

Yours very truly,

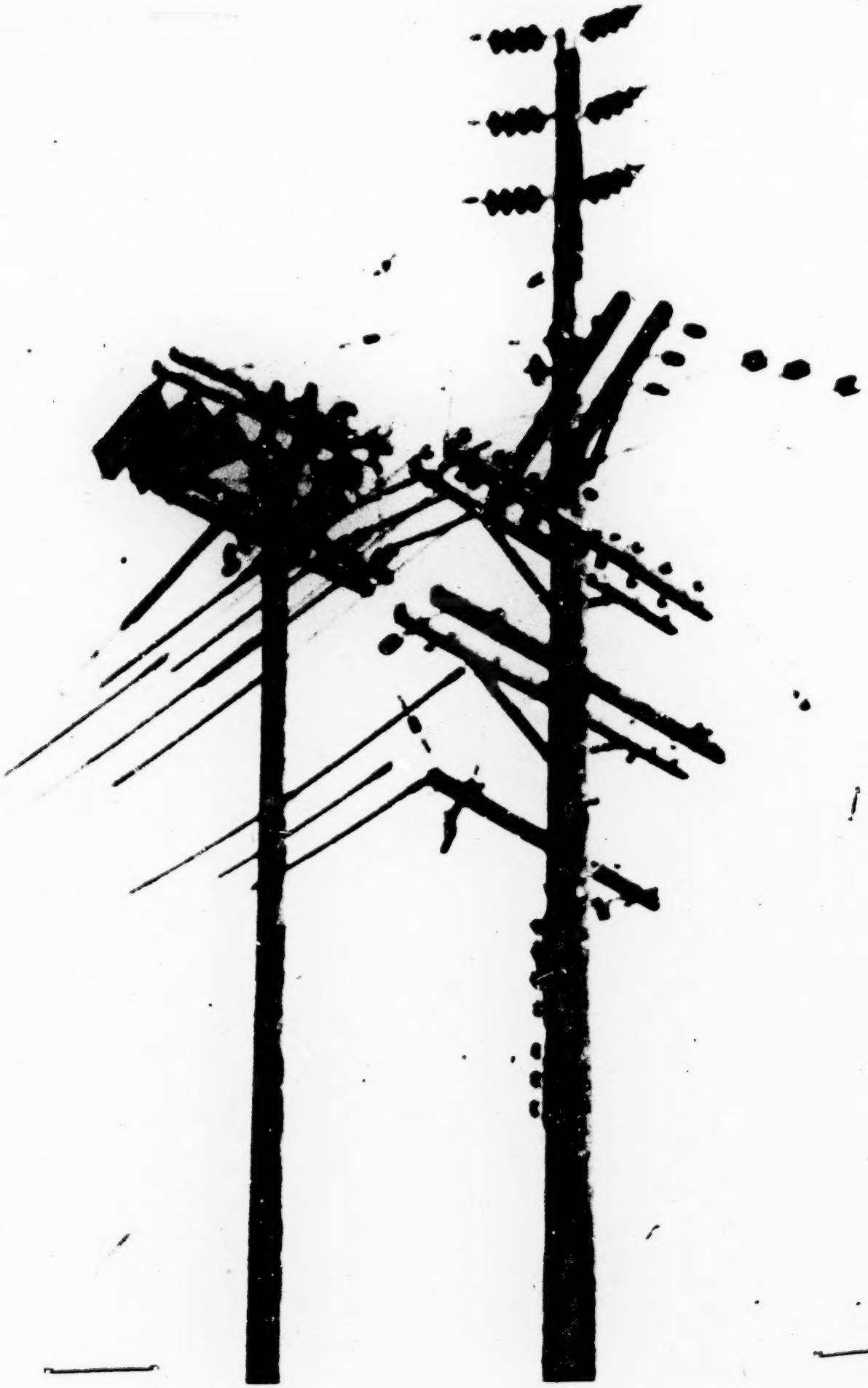
HOOSIER ENGINEERING COMPANY

/s/ F. E. Bettendorf,
Executive Vice President

Accepted: November 20, 1951

For: The Ohio Power Company

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APPENDIX.

(121) **Dr. Dwight Palmer,** .. being first duly sworn, was examined and testified as follows:

Cross Examination

By Mr. Gingher:

Q. What about his recollection as to matters immediately prior to the happening of the occurrence of the injury? A. I questioned him on that. He knew where he was working in Ohio, who he was working for, and he said that he remembered being on this pole.

Q. Well, did you interrogate him with respect to the details of how it happened?

Mr. Glick: If Your Honor please, I object to that on the ground that this is not a part of the direct examination.

Mr. Gingher: Why, he asked about his history.

The Court: I will overrule the objection.

A. Yes, I asked about it and he said he knew (122) nothing about it. The last thing he remembered was being up on the pole and the rest of the history was hearsay, what he had been told.

Q. The last thing he remembered was being up on the pole? A. Yes, sir. He said he had been told he slipped and got onto a hot wire, but he didn't remember that, of course.

Mr. Gingher: That is all.

Redirect Examination

By Mr. Glick:

Q. Now, Doctor, in your report of June 2, 1956, with reference to the last matter which you stated, is it not included in your history, this notation: "He was"—

Mr. Gingher: Just a minute. I object to this type of examination.

The Court: I will sustain the objection.

Mr. Glick: I haven't even framed my question, sir.

Mr. Gingher: Well, you are referring to his letter to you.

Mr. Glick: Mr. Gingher, on cross examination, went into this very history. I think I have every right to.

The Court: Ask the doctor any question you (123) want. If he needs to refer to his memorandum, he may do so.

Q. Doctor, when you answered Mr. Gingher's question with regard to the history of the incident of a slip, were you referring to this record? A. I was.

Q. Now, may I direct your attention to that record, sir? Starting with the paragraph "He was working", that would be two paragraphs from the bottom of your first page? A. Yes.

Q. And may I ask you to read what is contained in that history?

Mr. Gingher: I object. (Counsel looks at memorandum.)

Mr. Glick: If Your Honor please, if there is going to be any objection, I don't think Mr. Gingher has a right to pick up any report that he is objecting to.

The Court: The practice is when anybody wants to testify from a memorandum, opposite counsel may see it.

Mr. Glick: Counsel cannot object to a question pending and then rush over and look at the memorandum.

The Court: The doctor has used a memorandum to refresh his recollection. Counsel has a right to see it, regardless if it has anything to do with the objection or not.

(124) Mr. Glick, Well, it seems to me—

The Court: Let's don't argue about it, please.

Mr. Glick: Now, if Your Honor please, I am going to direct the court's attention to the fact that counsel is referring to a page other than that directed to the witness' attention.

The Court: Mr. Glick, it is perfectly proper as long as the doctor has brought in the memorandum, which he is using to refresh his recollection, for opposite counsel to look at it, or read the whole thing, if he wishes.

Mr. Glick: I desire an exception to be noted to that.

The Court: Now, Doctor, there was a question asked by Mr. Glick referring you to, I believe, two paragraphs of your memorandum. The objection was made by counsel for the defendant. Mr. Glick asked you to read those. I think it is not proper for you to read them, but you may look at them, refresh your recollection from them, if you want to, make any additional response to the question that has been asked by Mr. Glick.

The Witness: I don't know whether I have anything else to add or not. I have already stated the history as he gave it to me.

Q. Doctor, the memorandum that is being referred to is one that was prepared by you exclusively? (125) A. Yes, sir.

Q. The typing was done under your direction? A. Yes, sir.

Q. I ask you if this is not part of the memorandum which you prepared and dictated with regard to the incident which was referred to by Mr. Gingher in his cross examination, to this effect:

Mr. Ginger: Now, I am going to object before he reads it, if Your Honor please, because he has no right to read from that. He can interrogate him and he can refresh his recollection from it, but this is not offered as evidence and no part of it, as I understand.

The Court: It is not in evidence and I think not proper evidence. The doctor is your witness. He brought in his memorandum which he may use to refresh his recollection

in answering any question that he wishes. I think it is not proper for you to read anything into the record from it.

Mr. Glick: Well, if Your Honor please, this whole point arose out of what was established in cross examination. This is redirect.

The Court: Ask him a question on redirect examination without reading from his memorandum.

Q. Doctor, in your report included in the history with regard to the incident of the slip which (126) occurred on the pole, did you make a notation to the effect that he was working on a—

Mr. Gingher: I object. If Your Honor please, it is the same thing exactly.

The Court: Yes. You are reading from the doctor's own memorandum which he may use to refresh his recollection. I will say again, it is not proper to read that into the record.

Q. Now, Doctor, I had asked you to look at your memorandum, particularly the second paragraph above the bottom, on the first page thereof, and without reading word for word back as your answer, can you tell us if there is anything in that to indicate that he was told that he slipped?

Mr. Gingher: I object. He can't cross examine his own witness.

Mr. Glick: That is not cross examination, sir.

Mr. Gingher: Well, it is an attempt to impeach him.

The Court: You should ask the witness—you may ask the witness any question which you wish to ask him with reference to his examination. If he needs to use his memorandum to refresh his recollection in order to answer that question, he may do so.

Q. Doctor, may I ask you to refer to the (127) fifth paragraph, or the second paragraph at the bottom of the first

page, to refresh your memory with regard to the history obtained from Luther Creasy? A. (Witness does as requested by counsel.)

Q. Now, have you examined that, sir? A. I have.

Q. Is there anything in there which indicates that the fact that he slipped came from hearsay?

Mr. Gingher: I object.

The Court: Read the question.

(There upon the last Q. was read by the reporter.)

The Court: I will sustain the objection.

Q. Well, when Mr. Gingher questioned you about the memory, with regard to events, and you gave him an answer, was that your way of expressing what was in your memorandum? A. It was.

Q. And does your memorandum actually indicate that that was the correctness of that memorandum?

Mr. Gingher: I object.

The Court: I will sustain the objection.

Q. In other words, what I am trying to establish, Doctor, is that you used the word "hearsay" in your answer. Did you get that by referring to your memorandum or was that a word you used in the form of your (128) testimony? A. That was a word I used in the form of my testimony based on information I got from Mr. Creasy.

Q. But it is not in your report to that effect?

Mr. Gingher: I object.

A. Yes, it is. It is in there under the word "somehow" which I put in there for that purpose. He doesn't know how he slipped. He told me he slipped somehow, but he doesn't know now.

Q. He didn't go into the mechanics of explaining the slip? A. He told me he didn't remember.

Mr. Gingher: I don't like to object, but this is getting way beyond the bounds of propriety.

The Court: I will allow the question and answer.

Mr. Glick: I have no further questions.

Recross Examination

By Mr. Gingher:

Q. Is it a very common experience in case of severe injury that a person has no recollection of the events that precede the trauma or injury? A. It is.

Mr. Glick: Object.

(129) The Court: Overruled.

Mr. Gingher: That is all.

Mr. Glick: I am going to move to strike the answer and I submit that the question is highly dangerous and highly prejudicial.

The Court: Just a moment, please. What is your objection?

(Thereupon the motion of Mr. Glick was read by the reporter.)

The Court: Overruled.

Mr. Glick: I should like for the record to indicate—

The Court: Just a minute. If you wish to make a statement for the record, please make it to the reporter out of the hearing of the jury.

Mr. Glick: All right. Isn't it proper for Your Honor to know the basis for that?

The Court: If I wish to hear it, I will ask to have it read.

By Mr. Glick: (Out of the hearing of the jury) My objection is based upon the fact that the question is predicated on an inclusive and a broad speculative basis which is not the issue in this particular case that we are dealing solely with the aspect insofar as it applies to the plaintiff himself and not on a broad basis to be all (130) inclusive; that by permitting the question on recross examination, the question not only is objectionable in the category which

I have stated, but has gone beyond the area of redirect examination and has created an area of prejudice to the plaintiff by in advance of his even testifying having impeached him and characterized him, and in the same category having destroyed the value and integrity of his testimony before even being heard.

Mr. Gingher: Pardon me, are you through with your examination of the witness?

Mr. Glick: Yes, sir.

Q. I don't know whether it was established. I should like to ask the question: When did you make this examination? A. It was the first of this month, on the second day of June of this year.

Q. Second day of June of this year? A. Yes, sir.

Q. You had not seen him prior to that time? A. No, sir.

Q. Nor have you seen him since? A. Saw him today, but not professionally.

Mr. Gingher: Thank you.

Mr. Glick: I have no further questions. Have Mr. Louis Creasy resume the stand.

Louis Creasy,

being first duly sworn, was examined and testified as follows:

(147) **Cross Examination**

By Mr. Gingher:

Q. Now, Mr. Creasy, there has been some talk about this safety equipment and I would like to have you identify some of it, if you will, sir. I have an exhibit here to be marked as Defendant's Exhibit C.

Thereupon a piece of hose was marked for identification as Defendant's Exhibit C.

Q. (Continued) I hand you what has been marked as Defendant's Exhibit C, Mr. Creasy, and ask you to look at

it and tell the jury and the court what it is. A. That is a line—

Mr. Glick: Just a minute. Is Exhibit C being automatically accepted as an exhibit, or merely for the purposes of identification?

The Court: I believe it was marked for identification.

Mr. Gingher: That is all.

Mr. Glick: If that is so, I will withdraw the objection at this time.

A. This is what we call a line hose.

(148) Q. I notice that this opens all along the hose? A. That's right.

Q. How is that place on the line? A. You start from this end and start it on, and push it down the wire until it is all the way on.

Q. Then it is so constructed that it wraps itself around the wire? A. That's right.

Q. Now, how does a man put this on, or how did the men under your instruction apply this to the wire inasfar as to whether they had safety equipment on or not? A. They had a rubber sleeve and rubber glove.

Q. And they must have that on as they put the hose on the wire?

Mr. Glick: Just a moment.

A. That's right.

Mr. Glick: In cross examination, Mr. Gingher is attempting to establish a standard which he objected to my attempting to establish on direct examination. Now, if he wants to show that that is Hoosier's regulation, I think the time to do it is on the proof, because of his own objections and the exclusion of standards that we attempted to establish on direct. He is now attempting to do what he objected to us doing.

(149) Mr. Gingher: I might change it a little. Withdraw that.

Q. As the foreman on that job, as you observed the men working under your instructions, were they required to have their rubber protective gloves and sleeves on at the time they applied this type of protection, by hose on the energized line?

Mr. Glick: I am objecting to that on the same basis.

The Court: I will overrule it.

Mr. Gingher: You may answer.

A. They have them on.

Q. Are they required to wear anything on their feet? A. Yes, sir.

Q. And on that job, did the men have equipment on their feet? A. Yes, sir.

Q. And what kind of equipment was that? A. Overshoes, rubber overshoes.

Mr. Gingher: Mark these D-1 and D-2.

Thereupon two overshoes were marked for identification as Defendant's Exhibits D-1 and D-2, respectively.

Q. I hand you what has been marked Defendant's Exhibits D-1 and D-2, and state what those are? (150) A. These are overshoes that goes on their boots.

Q. Over the boots? A. Over their boots. Some wear boots; some wear low quarter shoes.

Q. Is that an 8-inch boot? A. 8-inch boot.

Q. Some wear boots— A. 16 inches high.

Q. 16 inches high, and these go over the boots—these exhibits go over the boots? A. Yes.

Mr. Gingher: Mark this Defendant's Exhibit E.

Thereupon a rubber blanket was marked for identification as Defendant's Exhibit E.

Q. Now, I hand you what has been marked as Defendant's Exhibit E. Will you state what that is? A. This is a rubber blanket.

Mr. Glick: Just a moment. Mr. Gingher, I think inadvertently, keeps referring to this as Defendant's Exhibit E, and the previous one—

The Court: Well, they are all for identification. The defendant cannot offer exhibits in evidence until in the defendant's case. So, they are not offered now.

Mr. Glick: Thank you. I just wanted the (151) record to show they are merely for identification purposes.

Q. Will you state what that is? A. This is a blanket that we use to throw over cut-outs and dead ends.

Q. What are cut-outs? A. Cut-outs, that is where you dead end your wires next to the crossarm. In other words, you use—

Q. The wire does go on through, you mean? A. Yes.

Q. You throw this over a dead end? A. That's right.

Q. Where else do you use it? A. We use it on cut-outs, transformers.

Q. Where are the cut-outs and transformers located with reference to the pole? A. They are close to a house where people get services or we have cut-outs out on the line.

Q. Those places you use blankets. Now, in the exhibit, Plaintiff's Exhibit 7, which was passed to the jury, what appears to be blankets and what you referred to as blankets, are those the same as the exhibit which you last saw? A. The same.

Mr. Gingher: Mark this as Defendant's Exhibit F.

(152) Thereupon a package was marked for identification as Defendant's Exhibit F.

Q. I now hand you what has been marked as Defendant's Exhibit F, and, first, that is a canvas container, is it not? A. We call them canvas glove pack.

Q. Now, what is in that? Will you remove what is in that exhibit, please? A. This is a pair of sleeves linemens puts on before they put their gloves on.

Q. Now, that sleeve, as you have put it on, for the benefit of the jury, extends up over the shoulders? A. That's right. There is a button in the back.

Q. Now, you say there is a button in the back? A. Supposed to be a button and strap to button in each one of those holes to hold it on his shoulder.

Q. That strap goes across your back so the sleeve is held in place up your arm and on the shoulder? A. That's right.

Q. Now, what else is in that? A. This is a pair of rubber gloves with leather protectors.

Q. Now, there are two pairs of gloves, apparently, or is it just one garment? (153) A. It is two garments.

Q. It is two? A. Yes.

Q. One underneath is rubber and then there is another glove that you put on outside of the rubber? A. It is leather.

Q. That is leather. And those have, what I would call, long sleeves that extend up over—or long extended wrists that extend up over the sleeve, which extends up over the shoulder; is that right?

Mr. Glick: I object to that question on the ground that the statement is volunteered by Mr. Gingher, and the exhibit being in court speaks for itself.

Mr. Gingher: It points up this cross examination.

The Court: I will overrule the objection.

Q. (Continued) In other words, the sleeve of the glove overlaps the rubber sleeve so that no part of the arm or wrist is exposed? A. That's right.

Q. Do you happen to know how this equipment is tested for the voltage that it will resist?

Mr. Glick: I object to the question.

The Court: Overrule the objection.

Q. (Continued) Do you know how it is tested (154) for its voltage, the voltage that it will resist? A. Not exactly. I know we send them in to get them tested.

Q. How often do you send them in or did you send them in when you were with Hoosier?—

Mr. Glick: If Your Honor please, I don't see how that could possibly be germane.

Q. (Continued) —Prior to this occasion?

Mr. Glick: I don't see how that could possibly be germane. How often they sent them in would not make any difference.

Mr. Gingher: I think it is to show the element of care which was being used for protection.

The Court: I will overrule the objection.

A. I believe it is three to four months; might be longer.

Q. Might it be less? A. Could be less.

Q. Could be less. But in any event, you do send them in with some regularity for inspection, to see that they are in good condition? A. Yes, sir.

Q. Now, in this work, Mr. Creasy, you had delivered to the job the material, that is, when you first went on the job; is that right? (155) A. It was delivered to me.

Q. The material was delivered to you as the foreman on the job? A. That's right.

Q. Now, let's take first the pole. In what form was that delivered to you? A. Come in on a pole truck and a trailer.

Q. Is there anything attached to the pole when it first comes in? A. Nothing.

Q. Now, do the crossarms come in—do they come to you? A. Yes, they come to me.

Q. And how are they delivered, by truck? A. That's right.

Q. Now, will you describe to the jury a crossarm? A. Well, a crossarm is a long piece of wood, 4 inches and a half wide and 8 feet long.

Q. Well, when you say four inches and a half wide and eight feet long, it is different dimensions on different sides. It is four and a half inches by what? A. Four and a half by three. I'm not sure.

Q. Which side is up and down, the three inch? A. No, the wide side.

(156) Q. Is up and down. What is the surface on the top that you would stand on, what width is that? A. I would say three inches.

Q. Now, does that have any holes in it? A. Yes, sir.

Q. What holes are there in it when it comes to you? A. It has six holes in it, three on each side from the center, for pins.

Q. Three on each side out on—as it would be on the pole, there would be three on each side of the pole; is that right? Is that what you mean? A. Some of them have four.

Q. How many were in this pole in question? A. Well, I believe most of them were four-pin arms; that is from center.

Q. Now, how is it attached to the pole? Is there a hole in the center or do you make the hole at the scene? A. No, it has a hole in the center.

Q. Do you drill any holes in it at all? A. We make double arms out of them.

Q. Beg pardon? A. We make double arms out of them, or dead end on them.

(157) Q. Now, this was a double-arm situation, wasn't it? A. That's right.

Q. So that you had to bore holes in the crossarms? A. That's right.

Q. And you did that before it was moved up on the pole; is that right? A. That's right.

Q. Now, who would do that? A. We lay two of them together on the ground, take a brace and bit, measure off a space, bore the hole.

Q. Now, do you go through both of them at the same time? A. Both arms at the same time.

Q. Now, when you erect the pole, are the crossarms on the pole, or are they placed on the pole after it is erected? A. I set the pole first.

Q. You set the pole first. Now, by that, you dig the hole for it. Does your crew do that? A. No. We bore the holes in the arm.

Q. Now, the hole for the pole in the ground, do you dig that hole that the pole is set in? A. At times; not all the time.

(158) Q. Did you, on this job? A. I believe I did.

Q. So that you and the men working for you, of whom Luther was one, dug the holes and you set the pole?

Mr. Glick: Now, if Your Honor please, I object to that because it connotes the fact that Luther did any digging of the holes.

Mr. Gingher: I said the crew of which Luther was one.

The Court: I will overrule the objection.

Q. Do you know whether Luther assisted in digging the hole? A. I don't think I had linemen to dig the hole. I had some helpers, what we call "helpers".

Q. All right. Did the linemen help put the pole in place? A. They put it in place.

Q. The linemen actually put the pole in place. How do you support it? A. Winch line and an A frame on a truck.

Q. Well, do you have any permanent lines that hold it in position that run from the pole down? A. No.

Q. In other words, it sets in the hole and that is sufficient? (159) A. No. We use pikes after we get it in the hole.

Q. Now, what are pike poles? A. They are long pieces of wood with a sharp point on the end of it, steel point made for these wooden handles.

Q. What do you do, drive those down against the pole into the ground? A. No, we stick them in the pole and we straighten the pole up and let them hold it.

Q. So you have supports coming up the pole? A. That's right.

Q. How many of those do you put in? A. We generally use four.

Q. Now then, after you have done that, you have the pole set, then the next job is to install the crossarm? A. Yes, sir.

Q. Now, the men have handled the crossarm for the purpose of drilling the holes, and you have observed them, have you not? A. That's right.

Q. You have seen the crossarm and it is handled for the purpose of drilling the holes? A. That's right.

(160) Q. That's right. Then after the holes are drilled and the pole is set, then the men go up, first, to place the crossarms; is that right? A. That's right.

Q. And they handle the crossarm as they are going up the pole and putting it in position; is that right? A. Yes, sir.

Q. Now, the first thing they do, as I understand it, is to bolt it in in the center of the crossarm, by the bolt? A. Yes, sir.

Q. Now, in this case, where you had a double, you did that on both sides of the pole? A. Yes, sir.

Q. So, you have two crossarms running parallel to each other, one on each side of the pole; is that right? A. That's right.

Q. Now, after you do that, it is necessary, is it not, to bolt the crossarm, the two crossarms together at the ends? A. Yes, sir.

Q. When do you make the hole for that? A. That is before it goes up the pole.

Q. You make that hole. Do you drill that hole? (161) A. No, sometimes that comes right.

Q. Do you remember what the situation was in this particular case? A. They were bore in them.

Q. Now, when the man gets up there, he has to, of course, work with the crossarm against the pole, in order to bolt it into the pole in the center; that is right, isn't it? A. That's right.

Q. Then he has to bolt it on both ends? A. That's right.

Q. That is true, isn't it? A. That's right.

Q. And then there is another metal arm that supports that crossarm, is there not? A. No. It is a wood arm.

Q. A wood arm. How does that support the crossarm in its position to hold it there? A. Comes down in a V-shape, two wood—what we call wood braces.

Q. It comes down at a point below the crossarm and starts it from the pole up to a crossarm? A. That's right.

Q. Where does it hit the crossarm with respect to the center? (162) A. It goes out past the first pin hole.

Q. And, of course, the men place that in position after the crossarm is installed on the pole; is that true? A. No, we put it on on the ground.

Q. You put this support on on the ground? A. That's right.

Q. Do you have to drill a hole for that? A. No, that comes drilled.

Q. That comes drilled, but you do have to attach it to the pole? A. That's right.

Q. And these supports were on this particular pole, were they not, on the crossarm? A. Yes, sir.

Q. Now, would you have four for a double crossarm? A. At times we use four and other times we use two.

Q. What did you use in this case? A. I would hate to say.

Q. Would it help you to look at the picture? A. It probably would. (Looks at picture.) Well, you can't tell.

Q. You can't tell by the picture? So, you (163) aren't sure whether you had two or four? A. I know it is at least two.

Q. At least two; and maybe four? A. Maybe four.

Q. Now, I hand you what has been marked for identification as Defendant's Exhibit B, and ask you to look at that and see if that will help you in determining whether there were two or four? A. Well, it show two on it, two on each double arm.

Q. Now, I see on this wire coming down, is that not a supporting wire from up between the two? A. That is what we call an 11,000 guy wire, with a wood breaker in it.

Q. An 11,000 guy wire. Now where does that go? A. That goes to an anchor back in the field, maybe twenty feet away from the pole; maybe thirty feet.

Q. Now, how many of those were on the pole? A. That I would hate to say.

Mr. Glick: If Your Honor pleases, it is all very interesting, but I don't see how all of this is material to this matter.

Mr. Gingher: We think it is very material.

The Court: You made an observation, not an (164) objection. If it is an objection, I will overrule it.

Mr. Glick: It is in the form of an objection, sir.

Q. Now, which crossarm is put up first? A. The top one.

Q. And then you come on down? A. That's right.

Q. Now, is there other hardware that needs to be attached? A. Yes, sir.

Q. What is that hardware? A. Well, it depends on what you're doing. If you're going straight through, you have to put pins and insulators on it, and if you are dead-ending—

Q. Were you dead-ending on this pole? Tell us about the hardware. A. Takes long bolts to go through the arm, plus what we call a clevis that holds this insulator to keep the hot wire from getting shorted out.

* * * * * * * * * * *

Statement of District Court to Jury.

(360) The Court: Ladies and gentlemen of the jury, some of you were on my jury the other day when I informed you that at the close of every case there arises a question of law where the court must decide upon the sufficiency of the plaintiff's case as a matter of law. Such a question has arisen in this case. It has, as a matter of fact, been anticipated by me almost from the inception of the case.

The court has duties to perform and juries where they hear cases or sit in deliberation on cases, have duties to perform. These duties are not always the most pleasant duties that we are called on to perform.

The American courts are great institutions. They are open at all times to all persons to file actions in cases in which that particular court has jurisdiction, in which they may seek redress of wrongs. There is no screening process or no point at which it can be determined that one case not be filed or that it should be filed, and that screening process comes only at a point like this in the trial and then this

court must determine, as a matter of law, whether or not there is sufficient basis for the case to go to the jury.

I share with you what I know to be your natural sympathies in this case. The plaintiff in this case has (361) been seriously and permanently injured through the accident that occurred here. Your sympathies may be somewhat alleviated, if you understand that the plaintiff was working for the Hoosier Engineering Company and that that company was compelled to and did subscribe to the workmen's insurance fund, which is known as the Workmen's Compensation Act.

So the plaintiff in this case has been compensated to the extent that is provided for in the Workmen's Compensation Act.

I merely mention that so when you leave here you will understand that and know that. If the defendant in this case were negligent and had caused the plaintiff's injuries, the fact that he had received workmen's compensation, would have no effect in this case and would not be a matter to be taken into consideration in your judyment or in your verdict. I desire to leave that thought with you.

Now, legally the situation is in this case that the Hoosier Engineering Company is what is known as an independent contractor and the Ohio Power Company is what you might term the owner in this case, and it had made a contract with the Hoosier Engineering Company to do this installation, and so the plaintiff in this case was working for the Hoosier Engineering Company in assisting (362) it in performing its contract. Being injured while in the employ of the Hoosier Engineering Company, he, as I have said before, was entitled to workmen's compensation But the Ohio Power Company could only be liable in the event that it had

done some negligent act, that is, committed some act of negligence which had resulted in the plaintiff's injuries.

I have searched the evidence carefully, and the claim made by the plaintiff is that the defendant, Ohio Power Company, furnished the material, furnished a pole and crossarm which had been creosoted. That seems to be the standard practice for utility companies to use creosoted poles and crossarms for preservation of their equipment. While, if that is wrong, they would not be justified in doing it, at the same time long practice that is so universally done, raises a very grave question as to whether or not the court should say they should not do that and all over the country they would have to stop creosoting their equipment.

But the essential element of this case is, that an owner company is not liable for work done by an independent contractor unless it has committed some negligence, and in order to commit negligence, it must be some act that it does that is not open and obvious to the plaintiff and the company that he is working for.

(363) Here the plaintiff had been a lineman for 22 years. The Hoosier Engineering Company knew that those poles were creosoted, that the crossarms were creosoted. They knew what happened in hot weather, that it gets sticky perhaps, and soft and they knew that these wires were hot wires, so to speak, and loaded with high voltage electricity, and the plaintiff and Hoosier Engineering Company knew just about as much about this particular job as the Ohio Power Company.

So, the court cannot find that there is any negligence on the part of the Ohio Power Company.

There are many cases on this subject and I have been reading these cases and examining them since the progress of this trial, and the court is of the opinion from any num-

ber of these cases, this case must be decided on the cases in Ohio.

Here is a case that was decided rather recently, in May of 1955, by the Supreme Court of Ohio, in which they announce the rule this way:

"It is apparent that this court in the Wellman case limited the rule, earlier announced in the Bosjnak case, to cases where the independent contractor and his employes enter upon the premises of the contractor's employer as his invitees, unaware and uninformed of hidden dangers on the premise which had been created by the (364) employer or of which he had full knowledge. Here Duffy and its employes had consented to work in an obviously dangerous environment, and in so doing it was Duffy's lack of care, under the circumstances, which proximately caused plaintiff's injury. It is to be noted that the work being performed was not directly with reference to construction on or repair of the premises themselves, but was an incidental operation for the benefit of the independent contractor. It was the independent contractor's and not the owner's operation, and it was entirely under the supervision and control of the former."

While there are many cases which announces the rule and the court understands the rule to be, in order to hold the Ohio Power Cmpany, there must be something in the nature of a hidden nature, a latent defect or something that would not be obvious to the plaintiff.

Then, there is a further matter. The court does not desire to attribute any fault to the plaintiff unnecessarily, but I think the rules, as they have been brought out here, require the plaintiff to put on his leather equipment when he reached the peint of primary area, which would be immediately under the wires and not go up through them. The

court finds also that the plaintiff was guilty of contributory negligence or (365) negiigence which would prevent his recovery.

You have sat here three days now and listened to the evidence in this case. I know you have sat sympathetically and interestedly and I felt that I owed you this explanation of what was happening to the case and I am sustaining a motion of the defendant for a directed verdict or for a judgment, and in this case I am going to order the judgment entered be in favor of the defendant without requiring the jurors to sign a verdict.

This will conclude this case and you will now be excused from this particular service and we have other jurors coming in on Monday, so you will have a little time here without being called. I am not sure when you will be called again, but probably in the not too distant future you will be called. I expect to be here for a couple of weeks.

Adjourn court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 744

LUTHER CREASY,

Petitioner,

vs.

OHIO POWER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

LUTHER CREASY,

Petitioner,

VS.

OHIO POWER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the Petitioner, Luther Creasy, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on November 1st, 1957.

Citations to Opinions Below

There was no formal opinion by the United States District Court for the Southern District of Ohio, Eastern Division. The judgment entry for that court appears in the Appellant's Appendix, p. 16a, and is set forth at page 1 App. The opinion of the United

States Court of Appeals is reported in 248, F. 2d 745, and is attached hereto in Appendix (pp. 2 to 9 App).

Jurisdiction

The judgment of the United States Court of Appeals was entered November 1, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1)

Questions Presented

1. Under *Erie R. R.* v. *Tompkins,* may a federal court refuse to follow an important question of substantive law of the State of Ohio as determined by the highest court of Ohio?

2. Under *Erie R. R.* v. *Tompkins,* may a federal court erroneously apply an important question of substantive law of the State of Ohio.

3. Under *Erie R. R.* v. *Tompkins,* may a Federal Court ignore the statutes of a State as its substantive law, in a case where jurisdiction in that Court is founded on diversity of citizenship?

4. Where the statutes of the State of Ohio provide that where a workmen sustains injuries by reason of defects in the ways, works, boats, wharves, plant, machinery, appliances or tools, of the employer or one who controls the place of employment, that such proof constitutes prima facie evidence of neglect, may a Federal Court direct a verdict against such workman, at the conclusion of his case consistent with the principles of *Erie R. R.* v. *Tompkins*?

5. Based on the foregoing, may a Federal Court deprive petitioner herein of a trial by jury consistent with the provisions of the Seventh Amendment to the United States Constitution and a consistent line of rulings of this Court, e. g. *Wilkinson* v. *McCarthy*, 336 U. S. 53 and *Lavender* v. *Kurn*, 327 U. S. 645?

Constitutional Provision and Statutory Provisions

The constitutional provision is the Seventh Amendment to the United States Constitution and is appended hereto at page 15.

The statutory provisions involved are *Ohio Revised Code* (1953), sections 4113.04, 4101.11 and 12 and 4121.01 and are appended hereto at pages 15-17.

Statement

Except where otherwise indicated, the following statement of the case is taken from the Appellant's Appendix.

Petitioner was an electric lineman since 1929. On June 25, 1952, he was employed by Hoosier Engineering Co., hereinafter referred to as Hoosier) an independent contractor. Hoosier was under a written contract with respondent, a public utility corporation, to set poles, install cross-arms and string in new wire for the purpose of stepping up the voltage in respondent's utility system.

All of the materials going into the work was furnished by respondent, including the cross-arms which had already been creosoted.

The work had been going on for about three weeks. At all times the wires were energized. The contract between Hoosier and respondent called for respondent's engineer to arrange all necessary clearances on the electrical circuits. Clearance is intended as a safety factor, and a simple operation to put in effect, merely requiring that two switches out of three be pulled from a circuit breaker, so that the breaker would operate manually instead of automatically, because if anyone should come in contact with the wires, the remaining switch would kick out and the flow of electricity stopped and stay off until the switch was manually closed.

Petitioner's foreman requested respondent's engineer for clearance on the lines, but the engineer refused to comply with this request.

On the day of the accident it was very warm. The nearest weather bureau disclosed the high temperature at 95°. There was proof that consistently in preceding years at that time of the year similar degrees of temperature were recorded in the area.

Some days before the accident petitioner had a dispute with respondent's engineer about the spacing of clamps and had threatened to quit the job, but was instructed by his foreman to do what respondent's engineer told him to do.

On the day of the accident, petitioner was directed by respondent's engineer to come off some work he was doing and to climb a fifty-five foot pole and to change the spacing on clamps at the upper part of the pole. It was shown that petitioner, in obedience to the order climbed the pole using a standard method

to do so, that when he arrived at his working point he stood on one of the creosoted arms and strapped himself to pole. While in this position he reached around to his right side to get out his safety equipment in order to commence work, and as he did so, because of the slippery condition of the arm, his feet went out off the arm and he was thrown into wires carrying 2300 volts of electricity.

A fellow worker broke his contact with the wires, and other fellow workers lowered him from the pole in an unconscious state. There was proof that there were slip marks on the arm and that on the following morning one of the workers who removed petitioner was directed to go up to the pole again by a safety man and the slip marks were still present and he so reported it.

Petitioner had no recollection of anything following his feet going out off the cross-arm until sometime in July when he was aware of being in a hospital.

As a result of the incident he had his right arm amputated by surgery below the elbow with complete functional loss of the arm to the shoulder. Two fingers on his left hand were amputated and he lost the functional use of another, so that he can only use his thumb and the finger next to it. He cannot dress himself or feed himself without assistance. He also sustained injuries to his head and side, a burn on his body, and severe damage to his nervous system.

At the time of trial in June, 1956, he was still in the hospital, and had been in various hospitals including Veterans Administration hospitals on and off.

At the conclusion of petitioner's proofs the Court granted a motion by respondent to direct a verdict on the ground that there was no proof of negligence.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of dismissal (App., infra, pp. 2 to 10).

The affirmance rests on grounds which does violence to the rule of *Erie R.R.* v. *Tompkins.* It runs contrary to former decisions of the Court, without expressly overruling them and ignores its own holdings in cases cited to support the decision; it ignores the Statute law of Ohio as the substantive law of that State. It is contrary to the substantive law of Ohio, and the substantive law of Ohio was erroneously applied. This is dealt with, infra, under Reasons for Granting the Writ.

Reasons for Granting the Writ

The Court below has decided a federal question in a manner conflicting with applicable decisions of this Court and has decided an important State question in conflict with applicable State law.

Since the holding of *Erie R. R.* v. *Tompkins,* 304 U. S. 64 (1937) it has been the rule for Federal Courts where jurisdiction is invoked because of diversity of citizenship that the court must follow the substantive law of the State where the cause of action for injuries arose. That opinion turned on the decisional law of the courts as governing the substantive rights therein. In that opinion reference is made to the acts of the Legislature of a State as

being a source of substantive law, but since statute law was not involved in the case, such reference appears to be dicta, unless this court now specifically holds that legislative enactments are substantive law.

Additionally, under the guarantee of the 7th Amendment, and the many cases in which this Court has ruled "that where jury trials are required, courts must submit the issues of negligence to a jury if the evidence might justify a finding either way on those issues." e. g. *Wilkinson* v. *McCarthy,* 336 U. S. 53, *Lavender* v. *Kurn,* 327 U. S. 645.

In *Lyon* v. *Mutual Benefit Health and Accident Asso.,* 305 U. S. 484, this Court granted certiorari dealing with the propriety of a directed verdict in an action based on State law in a diversity matter.

The Circuit Court of Appeals herein based its holding on its former decision in *Ford Motor Co.* v. *Tomlinson,* 229 F. 2d 873 (1956) (App., p. 6) wherein it is stated to have made a careful study of the law of Ohio dealing with the standard of conduct required by the owner of land with regard to the employee of an independent contractor.

Within five months after that decision, the Sixth Circuit decided *U. S. Steel Co.* v. *Olewinski,* 235 F. 2d, 326 (1956) based on *Ford Motor Co.* v. *Tomlinson,* and reached an opposite result, which latter result, we urge, is the correct one, and should have been applied herein.

The results of these cases, and the result in petitioners case have caused an irreconcilable situation and created a state of confusion in the law of Ohio.

Ford Motor Co. v. *Tomlinson* was an action brought by the employee of an independent contractor against Ford, who was constructing a building. The plaintiff was injured because a truck used by another independent contractor caused the toppling of a scaffold on which plaintiff was working. He charged Ford with liability pursuant to *Ohio Revised Code* 4101.11 and 4101.12, the so-called "frequenter" statutes, claiming Ford owed him the duty to furnish a safe place to work, and that Ford controlled the work. From an adverse judgment Ford appealed.

The Sixth Circuit reversed the judgment for plaintiff on the facts holding that Ford did not intermeddle in the work and that the injuries were actually caused by the employee of an independent contractor. In its decision it approved the application of the statutes as charged by the trial court and cited *Bosjniak* v. *Superior Sheet Steel Co.,* 145 Ohio 538 (Sup. Ct. Ohio, 1945).

Thereafter in its opinion, the court indulged in dicta and erroneously stated that those statutes were obviously enacted primarily for the benefit of employees, citing *Pare* v. *Gemco Eng. & Mfg. Co.,* 95 Oh. App. 141, and were rendered largely obsolete by the passage of Ohio's Workmen's Compensation law.

The Court cited this precise portion of its *Ford Motor* opinion in Petitioner's case (pp. 8 & 9 App.). It overlooked or failed to accord the language of the statute which protects frequenters as well as employees (p. 15).

Subsequently, in *U. S. Steel* v. *Olewinski,* supra, plaintiff, an employee of an independent contractor

sued U. S. Steel for injuries sustained on its premises and recovered judgment. U. S. Steel appealed because the court refused to direct a verdict against plaintiff. The Sixth Circuit affirmed, and stated that in *Ford Motor Co.* v. *Tomlinson* it took occasion to review the laws of Ohio as to liability of an owner for injuries received on his premises by an employee of an independent contractor with particular reference to the so-called "frequenter" statutes of Ohio. *Ohio Rev. Code* Sections 4101.11 & 4101.12.

It further said, "In the *Tomlinson* case as in *Schwartz* v. *General Electric,* the immediate cause of the accident was the negligence of other employees of an independent contractor over whom the owner exercised no control. *Not only is that factor not present in the instant case, but the dangerous instrumentality that caused the injury here, high-voltage electricty, was within the complete and exclusive control of the appellant.*" (Italics are the court's).

The italicized portion squares precisely with the position of petitioner herein, that respondent had exclusive control of a dangerous instrumentality which caused his injuries.

The cases upon which the court relied in affirming judgment against petitioner erroneously apply Ohio law. One case cited *Bosjniak* v. *Superior Sheet Steel,* 145 Ohio 538 (Sup. Ct. Ohio 1945) not only supports petitioner's position, but was relied on by petitioner at the trial in the District Court and on appeal to the Court of Appeals. In that case plaintiff was employed by an independent contractor, working on defendant's premises when he sustained an electric

shock when a crane came in contact with charged wires. The Ohio Supreme Court held:

> "Concededly the plaintiff, at the time of his injury, was on the premises of defendant as an employee of a contractor then engaged in the erection of a building for defendant. He was, therefore, an invitee of defendant who accordingly owed him the duty to exercise ordinary care to have the premises in a reasonably safe condition for use in a manner consistent with the purpose of the invitation."

Wellman v. *East Ohio Gas Co.,* 160 Ohio 103 (Sup. Ct. Ohio 1953) relied on by the court is not applicable herein. The Supreme Court of Ohio distinguished that case from *Bosjniak* and held that the accident was caused by the conduct of a fellow employee of plaintiff, both of whom were employed by an independent contractor and that defendant did not intermeddle or control the work.

Davis v. *Charles Shutrump & Sons,* 140 Ohio 89 (Sup. Ct. Ohio, 1942) cited in the decision of the court is equally inapplicable. In fact, the title of the case is misleading. The City of Youngstown was the appellant. The City contracted with a group of independent contractors to erect a bridge as part of its highways. Shutrump was the prime contractor. Plaintiff was working for Bethlehem Steel Co. and was injured on the unfinished bridge. He sued Shutrump and the City of Youngstown. The jury returned a verdict in favor of Shutrump and fastened liability on the City of Youngstown. The City appealed claiming it was engaged in a governmental function and that it exercised no control over the

work, but that Shutrump was actually in control. The Court upheld these contentions and reversed judgment.

Pare v. *Gemco Eng. & Mfg. Co.,* 95 Oh. App. 141 (Ct. of Appeals, Hamilton County, 1953) cited (App., p. 9) does not reflect Ohio law applicable herein. The Court there held plaintiff to be a trespasser to whom no duty was owed by defendant.

The Court endeavored to justify its position by factually determining that petitioner's knowledge of the hazard was fully as great as that of Respondent. Such ignores uncontradicted proof that petitioner was ordered to climb the pole by Respondent's engineer. Such order brought petitioner within the protection of Ohio law and specifically created a jury question.

Van Duzen Gas, Etc. Engine Co. v. *Schelies,* 61 Ohio 298 (Sup. Ct. Ohio, 1899) which holds:

> "An employee who performs an act apparently dangerous, under direction of his employer or a superior servant, is not prevented from recovering if a person of ordinary prudence would have obeyed such order, if he used ordinary care in obeying it."

Followed with approval in *Pennsylvania R. R. Co.* v. *Maslek,* 118 Ohio 644, per curiam affirmance of opinion in 26 Oh. App. 520 (Ct. of Appeals, 1927); *Schwable* v. *C. C. C. & St. L. Ry.,* 102 Ohio 97 (Sup. Ct. Ohio, 1921).

Erie v. *Tompkins* never contemplated so bizarre a situation as now exists herein. That case requires a

Federal court to follow State law, but not to confuse it.

The substantive law of Ohio as defined by its Supreme Court and applicable herein is found in *Bosjniak* v. *Superior Sheet Steel,* supra, also *Hozian* v. *Crucible Steel Casting Co.,* 132 Ohio 453 (Sup. Ct. Ohio, 1937) to the same effect.

After the line of State decisions *Ford Motor* v. *Tomlinson,* supra, came before the U. S. Court of Appeals which court reversed the judgment for plaintiff, and distinguished the case on its facts from Ohio decisions and held that the "frequenter" statutes were properly applied and are in force and effect.

In the same year *U. S. Steel* v. *Olewinski* followed in the same court of Appeals and *Ford* v. *Tomlinson* was cited as the basis for affirming judgment for plaintiff and again reference is made to the "frequenter" statutes and the defendant held liable.

The following year petitioner's case came before the same court, petitioner's legal status being the same as the plaintiff's in the preceding cases. Again the court refers to *Ford* v. *Tomlinson,* but makes no reference to *U. S. Steel* v. *Olewinski,* and now holds that the "frequenter" statutes do not apply; that they were obviously enacted for the benefit of employees and rendered largely obsolete because of the passage of the Ohio Workmen's Compensation law (App., pp. 8 and 9). Yet both statutes were enacted at the same time (1913) and are still contained in the latest revision of Ohio laws (1953).

The *U. S. Steel* case has not been overruled and the principle of that case while available to petitioner was not afforded to him.

By reason of these unharmonized decisions of the U. S. Court of Appeals, Sixth Circuit, what is the law applicable to an employee of an independent contractor who is injured while working by a dangerous instrumentality in the control of the defendant and or his premises?

Which case is to be followed?

If *Erie* v. *Tompkins* has the force it imports to have, what is the effect of *Bosjniak* v. *Supreme Sheet Steel* and *Hozian* v. *Crucible Steel Casting Co.*?

Because of the great industrial activity in the State of Ohio and the proximity of its industrial area to the borders of sister states, it is foreseeable that numerous similar cases may arise based on diversity of citizenship where the same question of law is involved. If the law is permitted to remain in this unpredictable state in the federal courts of Ohio, the consequences can become calamitous and only result in needless litigation and appeals.

The conflict in interpretation of Ohio law by the State Courts and the federal courts in that state amply demonstrate the need for this Court to grant certiorari to clarify the rights of untold numbers of workers who conceivably may be confronted with the same problem.

This court has heretofore acted under similar circumstances. *Equitable Life Ins. Co.* v. *Halsey, Stuart & Co.*, 312 U. S. 410 (1941); *Texarkana* v. *Arkansas, La. Gas Co.*, 306 U. S. 188 (1939).

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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Seventh Amendment to the United States Constitution

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Ohio Revised Code (1953)

4101.11—

Every employer shall furnish employment which is safe for the employees engaged therein, shall furnish a place of employment which shall be safe for the employees therein and for frequenters thereof shall furnish and use safety devises, and safeguards, shall adopt and use methods and processes, follow and obey orders, and prescribe hours of labor reasonably adequate to render such employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters.

Approved March 18th, 1913, 103 v. 95.

4101.12—

No employer shall require, permit, or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide, and use safety devices and safeguards or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe. No employer shall fail to do every-

thing reasonably necessary to protect the life, health, safety, and welfare of such employees or frequenters. No such employer or other person shall construct, occupy, or maintain any place of employment that is not safe.

Approved March 18th, 1913, 103 v. 95.

4113.04—

If the employee of any employer referred to in Section 4113.03 of the Revised Code receives any personal injury by reason of any defect or unsafe condition in any ways, works, boats, wharves, plant, machinery, appliances or tools, except simple tools, in any way connected with or in any way used in the business of the employer, such employer is deemed to have had knowledge of such defect before and at the time such injury was so sustained, and when the fact of such defect is made to appear upon the trial of an action brought by such employee or his personal or legal representatives against any such employer for damages on account of such injuries so received, the defect is prima facie evidence of neglect on the part of such employer. The employer may show by way of defense that such defect was not discoverable in the exercise of ordinary care.

Approved May 12th, 1910, 101 v. 195.

4121:01—

As used in sections 4121.01 to 4121.29, inclusive, of the Revised Code:

(A) "Place of employment" means every place, whether indoors or out, or underground, and the premises appurtenant thereto, where either temporarily ~~or~~ permanently any industry trade, or business is carried on, or where any process or operation,

directly or indirectly related to any industry, trade, or business, is carried on and where any person is directly or indirectly employed by another for direct or indirect gain or profit, but does not include any place where persons are employed in private domestic service or agricultural pursuits which do not involve the use of mechanical power.

(B) "Employment" means any trade, occupation, or process of manufacture or any method of carrying on such trade, occupation or process of manufacture in which any person may be engaged, except in such private domestic service or agricultural pursuits as do not involve the use of mechanical power.

(C) "Employer" means every person, firm, corporation, agent, manager, representative, or other person having control or custody of any employment, place of employment, or employee.

(D) "Employee" means every person who may be required or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, or to do, or work, or be at any time in any place of employment.

(E) "Frequenter" means every person, other than an employee, who may go in or be in a place of employment under circumstances which render him other than a trespasser.

(K) "Safe" or "safety", as applied to any employment or place of employment, means such freedom from danger to the life, health, safety, or welfare of employees or frequenters as the nature of the employment will reasonably permit, including requirements as to the hours of labor with relation to the health and welfare of employees.

Approved March 18th, 1913.

Judgment Entered in District Court

A jury having been duly impaneled and sworn, this cause came on to be heard on the complaint, the answer, the statements of counsel and the evidence offered by plaintiff. The plaintiff having rested his case, the defendant moved the Court for an order entering judgment in favor of the defendant. The Court being fully advised in the premises finds said motion to be well taken and the same hereby is sustained.

IT IS THEREFORE ORDERED that plaintiff's complaint be dismissed and that judgment be and the same hereby is rendered against the plaintiff and in favor of the defendant for its costs herein expended, to all of which plaintiff excepts.

/s/ LESTER L. CECIL
Judge

Approved as to form:

/s/ ROBERT L. MELLMAN
Robert L. Mellman

/s/ BERNARD S. GLICK
Bernard S. Glick

Attorneys for Plaintiff

GINGHER & CHRISTENSEN
By /s/ PAUL R. GINGHER
Paul R. Gingher

Attorneys for Defendant

Opinion of Court of Appeals, Sixth Circuit

(Filed November 1, 1957)

No. 13036

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LUTHER CREASY, *Appellant,* v. OHIO POWER COMPANY, *Appellee.*	APPEAL from a Judgment of the United States District Court for the Southern District of Ohio, Eastern Division.

Decided November 1, 1957.

Before SIMONS, Chief Judge, ALLEN and MILLER, Circuit Judges.

SIMONS, Chief Judge. While working on a pole of the Power Company near Hicksville, Ohio, appellant came into contact with energized electric wires and was severely injured. At the trial in the District Court, wherein he sought compensation for his injuries from the Power Company, the District Judge, at the conclusion of the plaintiff's evidence, directed a verdict for the defendant on the ground that there was no proof of negligence on its part, and on the further ground that the plaintiff was himself negligent.

The work at Hicksville was by contract being done by the Hoosier Engineering Company, concededly an independent contractor. Appellant was its employee and his specific job at the time of the accident was to change the spacing of clamps at or near the top of a 55′ pole belonging to the Power Company. On June 25, 1952, following the lunch period at noon, the appellant was requested by the Power Company's engineer to make adjustments on a crossarm of the pole. The crossarm was constructed of two timbers 8′ long and 4″ x 4½″ in width and depth, treated with creosote, and secured by bolts to each side of the pole and to each other. The crossarm was further secured to the pole by a V-shaped brace attached to the pole below the crossarm and to the crossarm itself. Two feet below the top crossarm but at a 45 degree angle to the top was another similarly constructed crossarm called a buckarm and 2 feet below the buckarm and parallel to the crossarm was another crossarm similar in construction. There were wires attached to both the crossarm and the buckarm, and four wires on the top crossarm were energized; the two nearest the pole being covered with a rubber blanket or rubber hose and the other two uncovered. There were energized wires attached to the buckarm and there were also energized wires on both sides of the pole on the lower crossarm.

The appellant came to the top of the pole passing in close proximity to both the covered and uncovered wires. He then stepped from the pole to the buckarm, hanging to the pole with one arm. He next put his safety belt around the pole and attached it to a ring in the belt around his waist, then leaned back to draw

the safety belt taut and for the first time reached for the packet containing rubber gloves and sleeves, fastened to his belt on his right side. It was then that the plaintiff's feet went out from under him and he remembers no more concerning the accident.

Creosote is a distillate of coal tar and is used as a wood preservative. When heated and present in wood in sufficient quantities it comes to the surface of the wood and makes it slippery. The day was hot enough to cause the creosote on the buckarm to come to the surface by capillary action. Following the accident, spike marks were observed upon the buckarm, one running to its outer edge. The appellant had followed the instructions of the defendant's engineer in climbing the pole, as directed to do by his brother, Louis Creasy, who was his foreman in the employ of Hoosier.

The appellant's complaint merely recites that he sustained an electric shock from a wire charged with high voltage, owned and controlled by the Power Company, "by reason of the negligence of the defendant." No specification as to negligent acts or omissions by the defendant are therein set forth. It is to be derived, however, from the several interrogatories propounded by the appellant, the evidence at the trial, and the argument presented orally and in briefs, that the negligence relied upon was the slippery character of the buckarm, the failure to warn the appellant of that condition, and the refusal of the Power Company to grant clearance on its wires when sought by the appellant, in view of the danger in working close to live wires.

The appellant was a lineman with twenty-two years experience. He had been working on the Power Company job for three weeks prior to the accident, had been up on the pole several times before and had stood on the same crossarm earlier on the very day of the accident; he knew the written safety rules of Hoosier and that they required him to put on his safety equipment consisting of rubber gloves and rubber sleeves when below the first hot wires. He so testified:

> Q. "And when you say you climbed to them, they are overhead? A. Oh, yes.
>
> Q. When you cover up? A. Yes, sir.
>
> Q. And when you talk about covering up we mean putting on your rubber gloves and sleeves? A. Yes, that's right."

He was also aware of the written Union rules which required safety equipment to be put on before reaching the first hot wire and that a lineman must assume all wires to be "hot." In addition to the safety rules of Hoosier and the requirements of the Union rules, there was also evidence that the Hoosier Company periodically conducted oral discussions as to safety measures and the use of safety appliances when working in proximity to energized wires. In regard to the use of creosote, it was established without contradiction that it is a preservative of wood used by practically all electric power companies and its use constituted standard practice. It is, likewise, to be noted that the Hoosier Company had complied with the Workmen's Compensation Act of Ohio; that appellant had received full workmen's compensation

benefits under the Act; and that following his injury the appellant was removed from the pole by other members of the Hoosier crew, who also finished the work without making any changes on the crossarms or the wires.

As in all questions of liability for negligent acts or omissions, the first consideration is whether the evidence discloses some fault on the part of the defendant leading proximately to the plaintiff's injury. In the recent case of *Ford Motor Company* v. *Tomlinson,* 229 F. 2d 873, this court made a careful study of the standard of conduct which the Supreme Court of Ohio applies to one in the defendant's position toward the employee of an independent contractor working on his premises and found upon analysis of the recent decisions of that court that they have dealt primarily with the extent of the owner's duty to warn of a defective or dangerous condition within the knowledge of the owner and neither known by or obvious to the contractor's employee. We relied upon *Schwarz* v. *General Electric Realty Company,* 163 Ohio 354, *Bosjnak* v. *Supreme Sheet Steel Company,* 145 Ohio 538, *Wellman* v. *East Ohio Gas Company,* 160 Ohio 103, and *Davis* v. *Charles Shutrump & Sons Company,* 140 Ohio 89. It is not here contended that Ohio has abandoned the common law tests of actionable conduct that liability must be imposed only if danger should have been perceived by a reasonably prudent man, under all circumstances of a particular case.

True, of course, it is that working in the vicinity of charged wires is a dangerous occupation but it is not foreseeable that an employee, invitee, or frequenter, would fail to make timely use of recognized safety ap-

pliances to minimize or avoid known hazards. We quoted from the *Davis* case, *supra*: "Where the premises upon which construction work is to be performed by a contractor remains under the control of the principal employer while work is in the course of performance, a servant of the contractor is an invitee and, as such, entitled to recover from the principal employer for any injury which he may sustain by reason of the abnormally dangerous condition of the premises, only if the principal employer has and the servant has not actual or constructive notice of the existence of such condition." The appellant knew, as he must have known by reason of the rules and instructions of his employer, and the Union rules, not only the inherent danger residing in energized wires but that the danger could be minimized or avoided by resort to safety devices with which he was supplied for his own protection. He knew, or must have known, of the characteristics of creosote applied to wooden timbers and the effect of heat upon them. As the District Judge put it, "If the court were to sustain this position (the use of creosote), it would mean that all public utility companies must stop using creosoted poles and crossarms."

It is clear, from the appellant's own evidence, that when he reached the first energized wires, below the place where he was to do his work, he passed through, or in close proximity to them, without covering up by means of the safety devices with which he was equipped. The very effort of the plaintiff to show a custom by linemen to wait until arrival at the place where work was to be done before covering up gives emphasis to the fact that he did not cover up when

reaching the first energized wires. It is true that some of these wires were covered with rubber blankets or rubber hose while other wires were uncovered, and even in respect to those that were covered the coverage was not in all cases complete. It was also clear that where he stood upon the buckarm he was exposed to uncovered wires on the top crossarm.

With respect to the characteristics of creosote, there can be but one reasonable inference and that is that the appellant knew crossarms would become slippery when subjected to heat. It was a hot day and while the temperature would be higher after lunch than before, his experience generally and immediately told him of the hazard in stepping upon the crossarm unequipped with the safety devices. Under the cited cases, there was, therefore, no duty to warn, even upon the assumption that the Power Company also knew of the danger. His knowledge of the hazard was fully as great as that of the Power Company, if not indeed more so. There was, therefore, under the Ohio decisions heretofore cited, no negligence in the use of creosote and no duty to warn a lineman of the possibility of a slippery condition on the narrow surface of the crossarm.

The present case must be decided by the application of Ohio law and the *Schwarz* case, *supra,* seems to be the last pertinent expression of it in respect to the duty of the owner of premises to the employee of an independent contractor. No reliance may, therefore, be placed upon the law of Master and Servant and the cases involving such relationship are not apposite; nor do §§ 4101.11, 4101.12 of the Ohio Revised Code apply. As we stated in *Ford* v. *Tomlinson, supra,* these Stat-

utes were obviously enacted primarily for the benefit of employees. *Pare* v. *Gemco Eng. & Mfg. Co.*, 95 Ohio App. 141. They were rendered largely obsolete by the passage of the Ohio Workmen's Compensation Law.

The failure to grant clearance on the lines was not negligence in view of the obligation of the Power Company to furnish light and power to the City of Hicksville while change-over was being made. This the appellant understood and knew the lines were energized for that purpose.

Since, in Ohio, freedom from contributory negligence is not part of the plaintiff's case but is a matter of defense, and since the case is to be decided upon the failure of the plaintiff to establish a duty to the appellant and the breach of that duty, we do not reach the question of contributory negligence and, so, the exclusion of evidence sought to be presented of a practice among journeymen linemen to pass through energized wires without putting on their safety equipment does not constitute prejudicial error. While we have referred to the Hoosier and Union rules and Hoosier instructions, these are merely matters of evidence and do not create a standard of conduct. *Wigmore on Evidence,* 3rd Ed. § 461. We have referred to them only as they bear upon the appellant's knowledge of abnormal conditions, which relieved the Power Company of any duty to warn.

Judgment affirmed.

Judgment of Court of Appeals, Sixth Circuit

(Filed November 1, 1957)

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No. 744.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth District

LUTHER CREASY,
Petitioner,

vs.

OHIO POWER COMPANY,
Respondent.

BRIEF FOR RESPONDENT

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MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 744

LUTHER CREASY,
Petitioner,

vs.

OHIO POWER COMPANY,
Respondent.

BRIEF FOR RESPONDENT

OPINIONS BELOW

Respondent is satisfied with the presentation made by petitioner in this regard. While there was no formal opinion by the United States District Court for the Southern District of Ohio, Eastern Division, the Court made a formal statement to the jury before discharging it in explanation of his reasons for directing a verdict in favor of respondent. This statement is set forth in the appendix of respondent annexed hereto at pages 28-32.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of the Court under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED

Whether under the established law of the State of Ohio there is any duty of protection owed by one who engages the services of an independent contractor to its employee who is injured while working on live power lines, which work involves real inherent dangers, known and fully appreciated by such employee, and where the injury sustained is a direct incident to the ordinary performance of the employee's work on such power lines.

STATUTORY PROVISIONS

Petitioner has referred to Section 4113.04, Ohio Revised Code. While this section has no application in the instant case, reference is made in said section to Section 4113.03, which is appended hereto at page 32. Petitioner has set forth certain definitions contained in Section 4121.01. This section is part of the Workmen's Compensation Law of Ohio and has no application here. However, the same definitions are contained in Section 4101.01 with respect to the use of the defined terms in Sections 4101.01 through 4101.16, inclusive.

STATEMENT

Petitioner has filed a certified copy of the appendix record which was used in the Court of Appeals. The statement of the case by petitioner is essentially correct so far as it goes. Petitioner has obscured some of the facts determinative of the issues on the motion for a directed verdict at the close of the petitioner's case, and neglected to state other facts relied on by the trial judge and the Court of Appeals in entering judgment in favor of respondent.

The Court of Appeals has accurately set forth the material controlling facts in this case in its opinion which is set forth in its entirety in petitioner's appendix to which reference is made. We do not believe it necessary to encumber this brief with a repetition of the facts as stated therein. Petitioner, of course, knew, as did all employees of Hoosier. that all of the wires on the power lines were charged or energized carrying high voltage electric current into the Hicksville area and had experience working under such conditions (156a).

This case involves an action for the recovery of money damages resulting from injuries sustained by plaintiff due to the alleged negligence of respondent.

The Court of Appeals affirmed the action of the District Court in granting the respondent's motion for a directed verdict in its favor at the close of petitioner's case and entered judgment thereon. The basic question raised by the petition for writ of certiorari filed by petitioner is whether the Court of Appeals decided an important state question in conflict with the applicable law of the State of Ohio. Petitioner claims that it did and is therefore seeking to invoke the appellate jurisdiction of this Court under 28 U. S. C., Section 1254(1). Rule 19 of the Supreme Court Rules sets forth the primary considerations governing review on certiorari.

It is the position of respondent that (1) there is no important state question involved, and (2) the decision of the Court of Appeals is completely in accord, not conflict, with the applicable Ohio law. Petitioner is not claiming that the Court of Appeals overlooked or ignored the applicable Ohio decisions, but simply that both the Court of Appeals and the District Court, in exercising their judicial discretion and judgment, incorrectly applied the accepted law to the undisputed facts.

ARGUMENT

The Court of Appeals concluded that there was no violation by respondent of any duty owed to petitioner. In addition to the absence of any breach of duty owed to petitioner by respondent, the evidence presented at the trial clearly established that the proximate causes of petitioner's injuries were the following: his assumption of the risk of injury in the circumstances, the failure of petitioner's employer, an independent contractor, to enforce its written safety rules relative to work on live power lines, and the failure of petitioner to use the protective safety equipment furnished by his employer in the manner required by such safety rules, or even in accordance with an alleged practice of linemen contrary to the rules.

The District Court, in addition to finding no breach of duty, also found that petitioner was guilty of negligence which would prevent his recovery. The Court of Appeals decided the case solely upon the failure of petitioner to establish a duty owing to him and the breach of that duty by respondent, and therefore did not consider the question of petitioner's negligence. Respondent shall confine its remarks here solely to the question of the duty of respondent to petitioner. We believe the conclusion is unavoidable, applying the applicable Ohio law and reason, that the actions and decisions of the District Court and the Court of Appeals are correct.

The Court of Appeals, in its decision (Pet. App., pp. 6 and 8), relied upon the decisions of the Supreme Court of Ohio:

> "As in all questions of liability for negligent acts or omissions, the first consideration is whether the evidence discloses some fault on the part of the defendant leading proximately to the plaintiff's injury.

In the recent case of Ford Motor Company v. Tomlinson, 229 F. 2d 873, this court made a careful study of the standard of conduct which the Supreme Court of Ohio applies to one in the defendant's position toward the employee of an independent contractor working on his premises and found upon analysis of the recent decisions of that court that they have dealt primarily with the extent of the owner's duty to warn of a defective or dangerous condition within the knowledge of the owner and neither known by or obvious to the contractor's employee. We relied upon Schwarz v. General Electric Realty Company, 163 Ohio 354, Bosjnak v. Supreme Sheet Steel Company, 145 Ohio 538, Wellman v. East Ohio Gas Company, 160 Ohio 103 and Davis v. Charles Shutrump & Company, 140 Ohio 89.

* * *

The present case must be decided by the application of Ohio law and the Schwarz case, supra, seems to be the last pertinent expression of it in respect to the duty of the owner of premises to the employee of an independent contractor."

I

The Court of Appeals and District Court Correctly Applied the Applicable Ohio Law

In recent years the Supreme Court of Ohio has passed on questions concerning the liability of a principal employer to an employee of an independent contractor. That is the general question presented in this case. We shall refer to three Ohio Supreme Court decisions and one decision of this Court in some detail due to their importance in this case. We regard these decisions, particularly the one in the *Wellman* case, as being dispositive of the question of the *duty* of respondent herein.

In *Wellman v. The East Ohio Gas Co.*, 160 Ohio St., 103 (1953), plaintiff was employed as a welder's helper by

Fithian Contracting Co., an independent contractor, which, under a written contract with defendant, was laying a six-inch gas line. Defendant had its inspectors "on the job" to see that Fithian performed its work according to specifications. The employees of Fithian, including plaintiff, attached by nipple and saddle a section of six-inch pipe to the side of a portion of the twelve-inch pressure gas main. Thereafter, *employees of defendant*, either assisted by employees of Fithian or with such employees in close proximity, installed a gate valve in the six-inch pipe and drilled an opening into the twelve-inch main through the six-inch pipe, thereby releasing gas into the six-inch pipe as far as the closed gate valve. The open end of this six-inch section of pipe was closed by employees of Fithian through the application of a rubber gasketed metal cap secured to the pipe by bolts passed through fianges. To further secure the cap and prevent the escape of gas which might seep through the gate valve, the cap was strapped to the pipe by steel rods, the ends of which were welded to the pipe. As a Fithian employee, plaintiff assisted in welding the nipple and saddle on the twelve-inch main and in welding the steel rods over the end of the cap.

A pipe-fitter employed by Fithian under orders from his foreman removed the cap from the end of the six-inch pipe. During such process the cap blew off, due to the pressure of gas which had seeped through the gate valve, and struck plaintiff on the legs, causing the fracture of one of them. There was testimony strongly indicating that the pipe-fitter proceeded improperly in attempting to remove the cap in that he cut the iron rods strapping the cap before loosening the bolts to permit the escape of gas which might have accumulated behind the cap. Plaintiff insisted at trial that he had no previous experience with high-pressure gas mains and did not know and was

not informed by anyone that gas had passed into the six-inch pipe from the twelve-inch main. However, plaintiff's foreman and the welder who was plaintiff's immediate superior, both Fithian employees, were fully cognizant of the entire situation and the reasons for bolting and strapping the cap on the end of the six-inch pipe.

The action was against the East Ohio Gas Company. A verdict and judgment for plaintiff in the trial court, affirmed on appeal by the Court of Appeals, was reversed by the Supreme Court and final judgment rendered for the defendant.

In reference to the cases cited by plaintiff in the *Wellman* case relating to situations where an independent contractor and his employees were unaware and uninformed as to a dangerous condition on the premises created by the owner or of which he had knowledge, the court held that such cases were not applicable. In concluding that defendant's motion for a directed verdict at the close of all the evidence should have been sustained, it is stated at pages 107 and 108 of the opinion:

> "In the instant case, an entirely different situation is presented. Here, Fithian, an independent contractor, was engaged by the defendant to lay gas pipes for it. As an incident of such engagement, a pipe was attached to a high-pressure gas main and later capped, which project was carried out by employees of Fithian, including plaintiff, *as a part of the work they were hired to do. By the very nature of the work and what was done in performing it, Fithian, through its foreman and the welder, plaintiff's immediate superior, was fully aware that gas might enter the pipe past the gate valve and of the potential danger which plaintiff might encounter. In these circumstances, it was Fithian's duty to warn and protect the plaintiff, and no such duty devolved on defendant.*" (Emphasis added)

The first and second paragraphs of the court's syllabus read as follows:

> "Where an independent contractor undertakes to do work for another, in the *very doing of which there are elements of real or potential danger and one of such contractor's employees is injured as an incident to the performance of the work*, no liability for such injury ordinarily attaches to the one who engaged the services of the independent contractor.
>
> "One who engages an independent contractor to do work for him ordinarily *owes no duty of protection* to the employees of such contractor, *in connection with the execution of the work, who proceeds therewith knowing and appreciating that there is a condition of danger surrounding its performance.*" (Emphasis added)

The fact situation presented in the *Wellman* case is remarkably similar to the instant case. Actually the *Wellman* case was a much stronger case for the plaintiff as there the plaintiff denied knowledge of the potentially dangerous condition, and further, he was completely innocent with respect to the immediate cause of the accident, i.e. he was standing by when the cap blew off and struck his leg. But, it was held by the Supreme Court of Ohio that where the very doing of the work involved potential dangers known to the injured employee's employer (the independent contractor) then there is no duty respecting such dangers owed to the injured employee by the principal employer. *In such circumstances it is the duty of the independent contractor to take the necessary steps to protect his own employees from injury.*

The independent contractor and his employees, in the *Wellman* case, were engaged in laying a six-inch gas line for the gas company along Belle Vista Avenue in Youngstown to be connected with a twelve-inch high pressure gas main belonging to defendant which extended along Maho-

ning Avenue; in the instant case the independent contractor and his employees were engaged in installing a power line for defendant power company along the railroad right of way outside of Hicksville. In the *Wellman* case *the defendant actually participated in the work* with respect to the installation of the gate valve in the section of six-inch pipe (it was the pressure of gas, having seeped through the gate valve, which caused the cap to blow off). The facts concerning control of the work area by the employer of the independent contractor are similar, if not identical, in both situations. In one case the danger was created by the presence of gas pressure, and in the other the danger was created by the presence of electric current transmitted by a wire. In the *Wellman* case the plaintiff was completely innocent with respect to the actual occurrence of the injury, whereas here the failure of petitioner and his employer to exercise due care was the immediate and direct cause of petitioner's injuries. Also, in both cases the defendant had an inspector or engineer at the place of work to see that the work was being done according to specifications. In the instant case Hoosier Engineering Company, its foreman and supervisors, as well as petitioner himself, proceeded with the work knowing and appreciating the condition of danger surrounding its performance; whereas in the cited case plaintiff denied such knowledge. Finally, and of greatest significance, is the fact that in both cases the potential danger was inherent in, and incident to, the ordinary performance of the work itself. The danger would exist in both cases no matter where the particular work involved was to be done. The surrounding work conditions or locale had absolutely nothing to do with either case—the danger was inherent in the work itself and would be present regardless of where the *place* of such work might be.

The court in the *Wellman* case rejected the application of *Bosjnak v. Superior Sheet Steel Co.*, 145 Ohio St., 538 (1945), relied upon by petitioner, where the dangerous condition of the premises was *unknown by* and *not obvious* to the invitee and where the employer of the independent contractor retained possession and control of the work area and actively participated in the work.

The second Ohio Supreme Court case relied upon by respondent is *Schwarz v. General Electric*, 163 Ohio St., 354 (1955). The first two paragraphs of the court's syllabus read as follows:

> "Where an owner of premises engages an independent contractor to do work thereon, an employee of the contractor while performing the work is on the premises impliedly as an invitee of the owner, and the owner owes the employee the duty of exercising ordinary care to maintain the premises in a *reasonably safe condition* for use, *this duty not extending, however, to any inherent hazards necessarily present because of the character of the work to be done.*
>
> "The rule that an owner must keep his premises in a reasonably safe condition for an independent contractor and his employees while performing thereon the work for which they are employed by the owner *does not apply to a hazard created by negligent operation by the independent contractor or his employees.*" (Emphasis added)

Duffy Construction Company was employed by defendant to do structural work at the plant, and as an incident thereto, to unload a carload of steel beams by means of a crane with a 45-foot boom with cables attached, the beams to be swung from the car for placement directly under a high voltage power line 36 feet above the ground and supported in position by poles. The high tension line was owned and operated by an electric company. The defendant designated the unloading site for the beams after Duffy

had leveled off and prepared the bed upon which the beams were to rest. The operation was entirely within the control of Duffy.

The foreman of the iron workers of Duffy knew of the presence of the power line and its potential danger. The proposed operation was recognized as a dangerous one by all parties concerned except the plaintiff who claimed that he had not seen the high tension line or been advised of its potential danger although he was working directly under the line when the accident happened.

The plaintiff was an iron worker of many years experience and was accustomed to working with cranes around high tension wires. This electric power line was of such size and construction that it should have been obvious to anyone in the immediate vicinity. Other Duffy employees testified that working with heavy equipment in proximity to high tension wires was common practice in construction work, and presented a well known hazard. There was no claim that the high tension line was improperly constructed or that it was out of repair.

Plaintiff was injured when the steel cables of the crane were swung too close to the high tension wires, with the result that the cables came in contact with the wires and plaintiff was severely injured by the current escaping from the line through the beam and cables. Duffy was in sole charge of the crane, and the immediate cause of the accident was the negligent operation of the crane by one of its employees. The trial court sustained defendant's motion for a directed verdict, plaintiff's motion for new trial was overruled, the Court of Appeals affirmed the judgment of the Common Pleas Court, and the Supreme Court of Ohio, allowing plaintiff's motion to certify, affirmed the judgment of the Court of Appeals.

Defendant claimed that since the plaintiff was employed by an independent contractor in the performance of a contract with defendant and the contractor had knowledge of the real and potential dangers surrounding the performance of the contract, the duty to protect the plaintiff and its other employees from injury was the duty of the independent contractor and not the duty of the defendant, and second, that the proximate cause of plaintiff's injury was the negligent conduct of the plaintiff himself and other employees of the independent contractor. The court found in favor of defendant in respect to both contentions.

In the instant case, as in the *Schwarz* case above, respondent was not in control of the work area and did not participate in the work; the condition which resulted in petitioner's injury was a hazard necessarily present because of the character of the work to be done of which Hoosier Engineering Company and its employees, including plaintiff, were well aware; and the condition became dangerous through the negligence of another employee of the independent contractor in the *Schwarz* case and through the negligence of the independent contractor and petitioner in the instant case.

The court, speaking through Judge Hart, distinguishes the *Bosjnak* case at page 360:

> "It is apparent that this court in the *Wellman case* limited the rule, earlier announced in the *Bosjnak case*, to cases where the independent contractor and his employees enter upon the premises of the contractor's employer as his invitees, *unaware and uninformed of hidden dangers on the premises which had been created by the employer or of which he had full knowledge.* Here Duffy and its employees had consented to work in an obviously dangerous environment, and in so doing it was Duffy's lack of care, under the circumstances, which proximately caused plaintiff's injury." (Emphasis added)

In *Davis v. Shutrump Co.*, 140 Ohio St., 89 (1942), the premises owner controlled not only the instrumentality that caused the injury, but also the entire premises on which the injury occurred. The first syllabus states the Ohio law to be that:

> "Where the premises upon which construction work is to be performed by a contractor remains under the control of the principal employer while the work is in the course of performance, a servant of the contractor is an invitee and as such entitled to recover from the principal employer for any injury which he may sustain by reason of the abnormally dangerous condition of the premises, *only if the principal employer has, and the servant has not, actual or constructive notice of the existence of such condition.*" (Emphasis added)

The *Schwarz* case extended the rule of *Davis v. Shutrump* to cases where only the independent contractor had knowledge of the danger or hazard without regard to actual knowledge by the injured employee himself, the duty of warning and protecting the employee then being upon the contractor and not upon the principal employer.

In *Davis v. Shutrump*, J. Hart speaking for the Court, states at page 93:

> "The very nature of the undertaking required what was done to be done, and it necessarily exposed the plaintiff and all the employees of the several contractors working on the various parts of the construction to the hazards naturally incident to this type of construction."

In concluding that the city (the principal employer) violated no duty owed to plaintiff, it is stated by J. Hart at page 95:

> "Since in this case the plaintiff possessed a full realization of the dangers surrounding his place of employment, which dangers, if any, were created as a

> result of the prosecution of the work by independent contractors, one of whom was plaintiff's employer, and since the city of Youngstown had no right or authority to direct the methods by which the work was to be performed, the city violated no duty to the plaintiff in that respect and cannot be held liable on the theory that it must provide him a safe place to work."

Petitioner makes the surprising statement at page 9 of his petition that the cases which the Court of Appeals relied upon in affirming judgment for respondent erroneously apply Ohio law, yet these cases are the unmodified decisions of the Supreme Court of Ohio, which, together with state statutes, constitute the substantive law of Ohio. It would seem that the petitioner's real complaint is with the Ohio law.

The above decisions of the Ohio Supreme Court provide the statement and application of the principles of law which are controlling here and which were correctly followed and applied by the Court of Appeals.

These same principles of law were applied by the Sixth Circuit in *Ford Motor Co. v. Tomlinson*, 229 Fed. (2d), 873 (1956).

Tomlinson brought an action for injuries he sustained while working as a painter in a plant under construction on the defendant Ford Motor Company's property near Cleveland, Ohio. Tomlinson was the employee of a painting contractor and was injured when the platform on which he was working was knocked down by an employee of another independent contractor both of whom were engaged in constructing the plant for the defendant. Plaintiff was engaged in painting an overhead sprinkler system while another independent contractor was engaged in laying wood block flooring. The manner in which the accident

occurred is aptly described in the following two paragraphs of the opinion of Judge Stewart at page 874:

> "While this painting work was in progress overhead, the employees of Jennison-Wright were installing wood block flooring in the same area of the plant. The wood blocks were brought to the place where they were needed in the plant area by a dump truck. This truck was operated and owned by Alfonso Ruffin, who had been hired by Jennison-Wright on an hourly basis. As the work progressed, Ruffin was told by the Jennison-Wright employees where to dump each load of wood blocks.
>
> "While the plaintiff and his fellow worker were thus engaged in painting the sprinkler pipes above, Ruffin's dump truck was, at the direction of the Jennison-Wright employees, spotted in a position not far from a point directly below one end of their scaffold. In order to unload the wood blocks, Ruffin raised the dump body to its maximum height of nearly thirteen feet above floor level and moved the truck forward quickly. The truck's elevated body snagged the loop of rope hanging from the end of the scaffold, pulled the scaffold down and caused the plaintiff to fall to the floor."

Ford was charged with negligence in failing to provide a safe place of employment, and in failing to warn those working at floor level of the work going on overhead or to take steps to avoid the simultaneous progress of the overhead painting and the floor laying in the same area of the plant. There was sufficient evidence to support a finding that it was Ford who had arranged for the sprinkler painting and floor laying operations to proceed simultaneously in the same area of the plant and that this had been done under the powers reserved to it in its prime contract with The H. K. Ferguson Company, the prime contractor for the erection of the plant. Judge Stewart states the basis of the plaintiff's argument as follows at pages 877 and 878:

> "Ford's liability was based upon its alleged independent negligence in directing that the painting and

> floor laying work proceed simultaneously, without taking any steps to warn against dangers implicit in the dual operation."

Ford argued that Sections 4101.11 and 4101.12 of the Revised Code imposed no liability upon it to the plaintiff, and that the plaintiff had actual or constructive knowledge of all the conditions which combined to cause his injuries and was therefore barred from asserting a claim against Ford. The Sixth Circuit held that it was error for the District Court to submit the question of Ford's liability to the jury, that Ford violated no duty to the plaintiff under the law of Ohio including the noted "frequenter" statutes, and that judgment should be entered in favor of the defendant.

The Sixth Circuit noted and discussed the cases relied upon by respondent herein, Judge Stewart commenting upon the *Schwarz* case at page 880 as follows:

> "In that case the contractor's employee was injured when a crane with which he and fellow workers were unloading steel came in contact with an electric power line. The immediate cause of the accident was the negligence of one of the contractor's other employees. The plaintiff stated that he had not seen the wire and had not been warned of its potential danger. *The court held that the defendant owner had performed its duty of exercising ordinary care by having previously warned the plaintiff's employer that the power line was energized.*" (Emphasis added)

The conclusion of the Sixth Circuit that the reason there was no duty owing by defendant to plaintiff with respect to the condition of danger created by its own affirmative action is stated clearly in the opinion at page 880 as follows:

> "There was no hidden defect or danger here. That the work of laying the flooring was proceeding simultaneously with the overhead painting was a fact as

obvious to the plaintiff as to Ford. Indeed, both the plaintiff and his foreman stated that they had observed the floor laying work in progress.

* * *

"In the present case, since the simultaneous progress of the painting and floor laying was obvious, there was as we have said no duty to warn the plaintiff of the situation. * * *"

The four cases noted above may be briefly summarized as follows:

Wellman v. East Ohio Gas Co.

Inherent potential danger incident to very performance of work; plaintiff denied knowledge of dangerous condition; held duty of independent contractor to warn and protect its employee and not that of principal employer.

Schwarz v. General Electric

Potential danger created by the direction of work by the resident engineer of the principal employer; plaintiff denied knowledge of the conditions; held defendant performed its duty by warning plaintiff's employer that the power line involved was energized.

Ford v. Tomlinson

Potential condition of danger (simultaneous progress of painting and floor laying) created by direction of principal employer which was open and obvious; held employer violated no duty to plaintiff under the law of Ohio.

Davis v. Shutrump Co.

Inherently dangerous condition incident to the type of work created on premises of principal employer which was fully known by employee of independent contractor; held defendant violated no duty to plaintiff.

How do the facts of the instant case compare with those in the above cases?

1. The potential danger here was one inherent in the performance of the work; it was necessarily incident to

the carrying on of the work, as in *Wellman v. East Ohio Gas Co.*

2. Defendant did not create the hazard or danger alleged by plaintiff to have proximately caused his injuries.

3. The condition was not hidden or concealed, but was open and obvious, as in *Ford v. Tomlinson*, only more so.

4. Plaintiff was fully and completely aware of the dangerous condition, which fact was denied by the plaintiff in the *Wellman* and *Schwarz* cases, and also apparently in *Ford v. Tomlinson.*

5. Defendant had no control over the place of work, the work itself, or the manner or method of doing the work by the employees of the independent contractor, as was true in all of the above cases.

Petitioner relies upon two decisions of the Ohio Supreme Court, both of which were decided before *Wellman v. East Ohio Gas Co., Schwarz v. General Electric* and *Ford v. Tomlinson.* The cases relied upon are *Bosjnak v. Superior Sheet Steel*, 145 Ohio St., 538 (1945), and *Hozian v. Crucible Steel Casting Co.*, 132 Ohio St., 453 (1937). The application of the *Bosjnak* case was urged by the plaintiff in both the *Wellman* and *Schwarz* cases and was rejected for the reason that the dangerous condition of the premises there involved was *hidden* and was *unknown by* and *not obvious to* the employee. Further, in that case the employer of the independent contractor retained possession and control of the work area and actively participated in the work, neither of which was involved in the instant case.

The *Hozian* case is clearly distinguishable from not only the instant case, but all the other cases noted above. The Court there held that it was error to direct a verdict in favor of the defendant where the plaintiff, an employee of an independent contractor, was struck and injured by a traveling crane on an elevated track, while engaged in

washing windows on defendant's premises in close proximity to the track, where testimony was proffered that one in apparent control of defendant's activities on the premises told the foreman of plaintiff's employer that the operation of the crane would be suspended during the progress of the window washing.

Petitioner refers to the decision of the Sixth Circuit in *U. S. Steel Co. v. Olewinski*, 235 Fed. (2d), 326 (1956). The substantive law of Ohio, of course, is found in the Ohio statutes and the pronouncements of the Ohio Supreme Court, and not the interpretation by a federal court of such law. The propriety of the *Olewinski* case, and whether the substantive law of Ohio was correctly applied there, is not the question here. The only question raised here is whether the Sixth Circuit decided this case, not some other case, in accordance with the applicable Ohio law. Further, the controlling facts in the *Olewinski* case are not set forth in the court's opinion, thereby making it difficult to determine the basis of the court's decision and equally difficult for the petitioner or anyone else to place any reliance on the decision one way or the other. The court refers to the controlling Ohio decisions in its opinion, and although it does not recite the facts involved, it is certainly to be assumed that the court correctly applied the Ohio law.

Petitioner claims further, at page 11 of his petition, that it was shown that he was ordered to climb the pole by respondent's "on the job" engineer, thereby bringing "petitioner within the protection of Ohio law and specifically created a jury question." The only authority cited by petitioner in support of this argument are Ohio decisions which state a rule of law relating to the affirmative defense of assumption of risk by an injured party who performs an act at the direction of his employer. This, of course, is

irrelevant to the question of the duty of respondent to petitioner, which was the basis of the decision of the Court of Appeals. Petitioner's claim in this respect is otherwise completely unsupported.

Petitioner urges the so-called Ohio "frequenter" statutes (Sections 4101.11 and 4101.12, Ohio Revised Code) as being the basis of respondent's liability. These statutes, so far as relevant here, provide:

4101.11:

> "Every employer * * * shall furnish a place of employment which shall be safe for the employees therein and for frequenters thereof * * *"

4101.12:

> "No employer shall * * * suffer any employee to go or be in any * * * place of employment which is not safe * * * No employer shall fail to do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees or frequenters. No such employer or other person shall construct, occupy, or maintain any place of employment that is not safe."

Petitioner also refers to Section 4121.01, which is part of the workmen's compensation laws of Ohio and has no application here. Reference is also made to Section 4113.04, Ohio Revised Code, which is the apparent basis of number 4 of the questions presented at page 2 of petitioner's petition and set out in full at page 16. It is not referred to elsewhere and no reasons are suggested and no authority cited in respect to the application of this statute to the instant case. The language "or one who controls the place of employment," stated in petitioner's question 4, does not appear in Section 4113.04. This section, besides being otherwise inapplicable here, by its express language relates only to actions brought by an em-

ployee against his employer as described in Section 4113.03. This latter section, dealing with the fellow servant rule, refers to an action brought by an employee to recover from his employer for personal injuries suffered "while in the employ of such employer," thus referring to the usual employer-employee relationship. The employer-employee relationship here, of course, was between petitioner and Hoosier Engineering Co., and not between petitioner and respondent. Because of the Ohio workmen's compensation laws, with which all employers who employ three or more persons are required to comply, this and certain other provisions of Chapter 4113 of the Ohio Revised Code are infrequently applied. As a matter of fact petitioner received full workmen's compensation benefits under the Workmen's Compensation Act of Ohio.

With respect to the "frequenter" statutes, it is apparent that such statutes impose no greater or different duty upon respondent in this case than that imposed by the common law, notwithstanding the serious doubt as to whether such statutes apply to the employees of an independent contractor doing work under the circumstances of this case.

It is noted that the statutes were not even mentioned in the opinions of the Ohio Supreme Court in the recent *Wellman* and *Schwarz* cases. In *Bosjnak v. Superior Sheet Steel Co.*, where the Supreme Court of Ohio did specifically consider and discuss the statutes, the Court defined the duty of the principal employer in the first paragraph of its syllabus as follows:

> "An employee of an independent contractor, while engaged in the erection of a building upon premises, the possession and control of which are retained by the owner, is an invitee to whom the owner owes the duty of exercising ordinary care to maintain the premises in a reasonably safe condition for use in a manner

> consistent with the invitation, and to inform the invitee of hazardous conditions of the premises and of activities thereon unknown by and not obvious to the invitee."

Matthias, J., in the *Bosjnak* case, after referring to the trial court's charge on the statutes which consisted of reading the statutes and then instructing the jury that they were to determine whether the defendant exercised reasonable care in compliance with the statutory requirements, states at page 550 in finding error in such charge:

> "The court, after quoting in full the provisions prescribing general rules of conduct, failed to call attention to the provisions of the statute essential to a correct consideration and application of the provisions read, and without which the instructions given were prejudicially erroneous.
>
> "Subsection 11 of Section 871-13, General Code, provides as follows:
>
> " 'The terms "safe," and "safety," as applied to any employment or a place of employment shall mean such freedom from danger to the life, health, safety or welfare of employees or frequenters as the nature of the employment will reasonably permit * * *.'
>
> "It is obvious that the words 'safe' and 'safety,' as thus defined, have a much more restricted meaning than would ordinarily be accredited them. These provisions, when considered and construed together, do not create an absolute duty or unconditional liability or constitute the employer an insurer."

Subsection 11 of Section 871-13, General Code, is now Subsection (K) of Section 4101.01, Ohio Revised Code. The definition contained therein really means nothing more than that defendant owes a duty to plaintiff to exercise ordinary care under the circumstances.

Thus, it makes no difference whether the statutes are or are not applied here. The question of the legal liability of defendant will be determined on the basis of the same

standards of conduct with or without the statutes. In other words, as applied to this situation, the statutes simply represent a codification of the common law. Such was the conclusion of the Sixth Circuit in *Ford Motor Company v. Tomlinson* at page 879:

> "* * * The simple fact seems to be that, at least with respect to 'frequenters,' the Ohio appellate courts have *not* regarded those statutes as exacting a duty substantially *different* from that imposed generally by Ohio law upon an owner of property towards an invitee. * * * Our attention has been called to no case where an appellate court in Ohio has held that *the statutes* here involved either *added* to or *detracted* from the duty of exercising ordinary care which a property owner owes to an invitee." (Emphasis added)

Petitioner does not suggest what duty is imposed upon respondent in this situation by the "frequenter" statutes which is not also required by the common law as stated and applied in the several decisions of the Ohio Supreme Court previously noted and as applied by the Court of Appeals in this case.

As a matter of fact, the Ohio Supreme Court has never held any of the safety statutes as being a basis for imposing liability in this type of fact situation. The same fact pattern was present in the *Wellman* and *Schwarz* cases and the statutes were not even mentioned by the Ohio Supreme Court, although the Court would take judicial notice of such statutes and apply any that were relevant. Thus, the substantive law of the State of Ohio on this point is clear, and was followed by the Court of Appeals.

II

There is No Question of Denial of Petitioner's Right of Jury Trial

Petitioner claims that the District Court and Court of Appeals deprived him of a trial by jury contrary to the provisions of the Seventh Amendment to the United States Constitution. Although this argument was not even made to the Court of Appeals, and is being made now for the first time, it is so specious as to hardly merit comment. It is obviously true that the right of trial by jury is guaranteed to all citizens by the United States Constitution as well as the Constitution of the State of Ohio and cannot be invaded or violated by judicial decree. It is also true, however, that this does not mean that all cases, regardless of evidentiary aspect, must be submitted to a jury. Neither of the cases cited by petitioner so hold, but recognize that the issues of negligence in a case of this kind must be submitted to a jury only where reasonable evidence has been presented in reference to the issues which is legally sufficient to make a prima facie case. Obviously, there is no question here of denial of right to trial by jury. The question simply is whether, under the evidence and the applicable Ohio law, the issues in this case should have been submitted to the jury.

III

There is No Important State Question Presented

There is no grounds for certiorari here for the further reason that the decision of the Court of Appeals in this case did not involve an important state question. The question decided by the Court of Appeals involving the duty of respondent under the circumstances of this case was based upon the application of the settled governing principles of law as announced by the Ohio Supreme Court to the particular facts of this case. There is no principle of Ohio law involved which requires settlement. There is no question of importance to the public. It is important only to the parties. Principally, the petitioner argues that his evidence was sufficient to make a prima facie case, to raise a jury issue. Both the District Court and the Court of Appeals found that it was legally insufficient and therefore held that a verdict in favor of respondent should be directed and judgment entered thereon. Certiorari jurisdiction was not conferred upon and has not been exercised by this Court merely to give the defeated party in the Court of Appeals another hearing.

CONCLUSION

The decision of the Court of Appeals is in complete accord with the pertinent and authoritative decisions of the Ohio Supreme Court which are conclusive of the basic issue respecting the duty of respondent to petitioner involved here.

The Supreme Court of Ohio on several occasions has clearly held that as to an employee of an independent con-

tractor engaged in work on an instrumentality, the very doing of which involved real inherent dangers, who is injured as a direct incident to the ordinary performance of his work on such instrumentality, there is no duty owed to such employee by the principal employer; and further, that a principal employer owes no duty of protection to an employee of such independent contractor with respect to a real or potential danger "in connection with the execution of the work" and "surrounding its performance" when the independent contractor or the injured employee has notice of and is aware of such danger.

In the instant case the very work undertaken by Hoosier Engineering Company, the independent contractor, involved elements of real or potential danger which there was no practicable means for respondent to avoid. Petitioner was injured by the very instrumentality which was the subject of the independent contractor's work, over which the independent contractor had control and on which petitioner was working. Respondent had no control over the work area, or the method or manner of the performance of the work, and did not in any manner actively participate in the work. All that respondent did was to furnish certain materials to be erected and installed by petitioner's employer. To impose liability on respondent in this situation would make it an insurer. There was nothing, absolutely nothing, that respondent, in the exercise of ordinary care, could have done to avoid the injuries sustained by petitioner. *The dangerous conditions here were necessarily included in and a part of the work place.* There was only one thing which could have resulted in the avoidance of the injuries sustained by the petitioner, to-wit, compliance with the safety rules and regulations of the Hoosier Engineering Company and the Union by Hoosier

and the petitioner. Such safety rules and regulations were disregarded.

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATEMENT OF DISTRICT COURT TO JURY

The Court: Ladies and gentlemen of the jury, some of you were on my jury the other day when I informed you that at the close of every case there arises a question of law where the court must decide upon the sufficiency of the plaintiff's case as a matter of law. Such a question has arisen in this case. It has, as a matter of fact, been anticipated by me almost from the inception of the case.

The court has duties to perform and juries where they hear cases or sit in deliberation on cases, have duties to perform. These duties are not always the most pleasant duties that we are called on to perform.

The American courts are great institutions. They are open at all times to all persons to file actions in cases in which that particular court has jurisdiction, in which they may seek redress of wrongs. There is no screening process or no point at which it can be determined that one case not be filed or that it should be filed, and that screening process comes only at a point like this in the trial and then this court must determine, as a matter of law, whether or not there is sufficient basis for the case to go to the jury.

I share with you what I know to be your natural sympathies in this case. The plaintiff in this case has been seriously and permanently injured through the accident that occurred here. Your sympathies may be somewhat alleviated, if you understand that the plaintiff was working for the Hoosier Engineering Company and that that company was compelled to and did subscribe to the workmen's insurance fund, which is known as the Workmen's Compensation Act.

So the plaintiff in this case has been compensated to the extent that is provided for in the Workmen's Compensation Act.

I merely mention that so when you leave here you will understand that and know that. If the defendant in this case were negligent and had caused the plaintiff's injuries, the fact that he had received workmen's compensation, would have no effect in this case and would not be a matter to be taken into consideration in your judgment or in your verdict. I desire to leave that thought with you.

Now, legally the situation is in this case that the Hoosier Engineering Company is what is known as an independent contractor and the Ohio Power Company is what you might term the owner in this case, and it had made a contract with the Hoosier Engineering Company to do this installation, and so the plaintiff in this case was working for the Hoosier Engineering Company in assisting it in performing its contract. Being injured while in the employ of the Hoosier Engineering Company, he, as I have said before, was entitled to workmen's compensation. But the Ohio Power Company could only be liable in the event that it had done some negligent act, that is, committed some act of negligence which had resulted in the plaintiff's injuries.

I have searched the evidence carefully, and the claim made by the plaintiff is that the defendant, Ohio Power Company, furnished the material, furnished a pole and crossarm which had been creosoted. That seems to be the standard practice for utility companies to use creosoted poles and crossarms for preservation of their equipment. While, if that is wrong, they would not be justified in doing it, at the same time long practice that is so universally done, raises a very grave question as to whether or not the court should say they should not do that and all over the country they would have to stop creosoting their equipment.

But the essential element of this case is, that an owner company is not liable for work done by an independent contractor unless it has committed some negligence, and in order to commit negligence, it must be some act that it does that is not open and obvious to the plaintiff and the company that he is working for.

Here the plaintiff had been a lineman for 22 years. The Hoosier Engineering Company knew that those poles were creosoted, that the crossarms were creosoted. They knew what happened in hot weather, that it gets sticky perhaps, and soft and they knew that these wires were hot wires, so to speak, and loaded with high voltage electricity, and the plaintiff and Hoosier Engineering Company knew just about as much about this particular job as the Ohio Power Company.

So, the court cannot find that there is any negligence on the part of the Ohio Power Company.

There are many cases on this subject and I have been reading these cases and examining them since the progress of this trial, and the court is of the opinion from any number of these cases, this case must be decided on the cases in Ohio.

Here is a case that was decided rather recently, in May of 1955, by the Supreme Court of Ohio, in which they announce the rule this way:

"It is apparent that this court in the Wellman case limited the rule, earlier announced in the Bosjnak case, to cases where the independent contractor and his employees enter upon the premises of the contractor's employer as his invitees, unaware and uninformed of hidden dangers on the premises which had been created by the employer or of which he had full knowledge. Here Duffy and its employees had consented to work in an obviously dangerous environment, and in so doing it was Duffy's lack of care,

under the circumstances, which proximately caused plaintiff's injury. It is to be noted that the work being performed was not directly with reference to construction on or repair of the premises themselves, but was an incidental operation for the benefit of the independent contractor. It was the independent contractor's and not the owner's operation, and it was entirely under the supervision and control of the former."

While there are many cases which announces the rule and the court understands the rule to be, in order to hold the Ohio Power Company, there must be something in the nature of a hidden nature, a latent defect or something that would not be obvious to the plaintiff.

Then, there is a further matter. The court does not desire to attribute any fault to the plaintiff unnecessarily, but I think the rules, as they have been brought out here, require the plaintiff to put on his leather equipment when he reached the point of primary area, which would be immediately under the wires and not go up through them. The court finds also that the plaintiff was guilty of contributory negligence or negligence which would prevent his recovery.

You have sat here three days now and listened to the evidence in this case. I know you have sat sympathetically and interestedly and I felt that I owed you this explanation of what was happening to the case and I am sustaining a motion of the defendant for a directed verdict or for a judgment, and in this case I am going to order the judgment entered be in favor of the defendant without requiring the jurors to sign a verdict.

This will conclude this case and you will now be excused from this particular service and we have other jurors coming in on Monday, so you will have a little time here with-

out being called. I am not sure when you will be called again, but probably in the not too distant future you will be called. I expect to be here for a couple of weeks.

Adjourn court.

APPENDIX B

SECTION 4113.03, OHIO REVISED CODE

In all actions brought to recover from an employer for personal injuries suffered by his employee or for death resulting to such employee from such personal injuries, while in the employ of such employer, arising from the negligence of such employer or any of such employer's officers, agents, or employees, it shall be held in addition to any other liability existing by law that any person in the employ of such employer, in any way having power or authority in directing or controlling any other employee of such employer, is not the fellow servant, but superior to such other employee; any person in the employ of such employer in any way having charge or control of employees in any separate branch or department shall be held to be the superior and not the fellow servant of all employees in any other branch or department in which they are employed; any person in the employ of such employer whose duty it is to repair or inspect the ways, works, boats, wharves, plant, machinery, appliances, or tools, in any way connected with or in any way used in the business of the employer, or to receive, give, or transmit any signal, instruction, or warning to or for such employees, shall be held to be the superior and not the fellow servant of such other employees of such employer.